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No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TREADWELL FORD, INC.,

Appellant,

v.

CLARENCE W. CAMPBELL, *et al.*,

Appellees.

On Appeal From The Supreme Court Of Alabama

JURISDICTIONAL STATEMENT

---

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QUESTIONS PRESENTED

1. Whether § 12-22-72, *Code of Alabama* (1975), under which a mandatory penalty of ten percent of any money judgment is automatically imposed on an unsuccessful defendant-appellant, but which imposes no corresponding burden on an unsuccessful plaintiff-appellant, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the award of approximately $1,300,000 in punitive damages against appellant is violative of the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States as made applicable to the States through the Due Process Clause of the Fourteenth Amendment of the Constitution, and is otherwise invalid under the Due Process Clause of the Fourteenth Amendment because it is grossly disproportional to the wrong sought to be punished and equally out of scale with any penalties for analogous criminal conduct prescribed by the Alabama legislature.*

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* Appellant, Treadwell Ford, Inc., is a closely held Alabama corporation which has no parent, affiliate or non-wholly owned subsidiary for purposes of Rule 28.1 of the Rules of this Court. The assets of Treadwell Ford, Inc. were purchased while this litigation was pending in the court below by Dobbs Mobile Bay, Inc., but Treadwell Ford, Inc. remains responsible for the judgment below. Other parties to this case below (and a consolidated case heard and decided with it) in addition to appellee Clarence W. Campbell include appellees Katharine Chapman Hamilton and Frederick B. Hamilton as Co-executors of the Estate of Sallie Chapman Hamilton; Jacqueline Evans; and Dairyland Insurance Co.

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JURISDICTIONAL STATEMENT

Treadwell Ford, Inc., the appellant, appeals from so much of a final decision of the Supreme Court of Alabama dated January 10, 1986, as affirmed a judgment of punitive damages against it by the Circuit Court of Mobile County, and the order of the Supreme Court of Alabama dated March 7, 1986, correcting its January 10 opinion and overruling appellant's Application for Rehearing filed with respect to that January 10, 1986 decision. Under this decision and order, appellant's rights under the Due Process Clause of the Fourteenth Amendment, and the Excessive Fines Clause of the Eighth Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment, have been denied. Moreover, § 12-22-72, *Code of Alabama* (1975), under which an automatic penalty of ten percent of the total $1,410,000 judgment was imposed on appellant upon entry of the January 10, 1986 decision affirming that judgment, has been upheld against appellant's claim that that statute on its face and as applied violates appellant's rights under the Equal Protection Clause of the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama of January 10, 1986 is reproduced in App. A, *infra*, 1a-13a, and is unofficially reported in 20 Ala. Bar. Rep. 874. The order of the Supreme Court of Alabama of March 7, 1986 correcting its opinion and overruling appellant's Application for Rehearing is reproduced in App. B, *infra*, 14a-22a, and is unreported. The Circuit Court of Mobile County issued no opinion.

JURISDICTION

The January 10, 1986 decision and March 7, 1986 order of the Supreme Court of Alabama necessarily upheld, *sub silentio*, § 12-22-72, *Code of Alabama* (1975), against appellant's claim under the Equal Protection Clause of the Fourteenth Amendment that § 12-22-72 is facially unconstitutional. Because the judgment and order, App. C, *infra*, 23a, assessing a ten percent penalty against appellant pursuant to this statute was compelled by the January 10, 1986 decision of the Supreme Court of Alabama and was therefore not part of any appealable judgment until that time, appellant's federal constitutional challenge to § 12-22-72 was, pursuant to an unbroken line of seventeen cases decided over a 125-year period by the Supreme Court of Alabama, presented in appellant's brief in support of its Application for Rehearing, App. D, *infra*, 25a. A Notice of Appeal of this case to this Court was filed in the court below on April 30, 1986. App. E, *infra*, 32a. This Court has jurisdiction of this case under 28 U.S.C. § 1257(2). Question 2 was duly presented to the Supreme Court of Alabama as discussed *infra* and may be decided with this appeal. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

This appeal is being docketed in this Court within 90 days from the March 7, 1986 order of the Supreme Court of Alabama overruling appellant's Application for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment of the Constitution provides, in pertinent past, that:

> [N]or [shall] excessive fines [be] imposed . . . .

2. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> [N]or shall any State deprive any person of . . . property, without due process of law . . . .

3. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

4. Section 12-22-72, *Code of Alabama* (1975), provides, in pertinent part, that:

> When a judgment . . . is entered . . . for money . . . and the same has been stayed on appeal by execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against any or all of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court . . . .

STATEMENT OF THE CASE

Appellant seeks plenary consideration of its contentions that so much of a total judgment of $1,410,000 as was imposed on it in punitive damages, and the $141,000 appeal penalty automatically adjudged on that $1,410,000 judgment under § 12-22-72, *Code of Alabama* (1975), have deprived appellant of substantial rights guaranteed by the specific provisions of the Constitution of the United States enumerated above. The constitutional issues presented are substantial. Question 2 is virtually identical to Question 4 as briefed and argued to, but not decided by, this Court in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (April 22, 1986). Question 1 is identical to Question 1 as presented to this Court in *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted*, March 24, 1986). These issues, as the following discussion demonstrates, are substantial and were properly presented to the courts of Alabama.

A. Facts Relevant to the Constitutional Questions Presented

In late 1979, Gary Nicholson bought a new Ford F-100 pickup truck from a dealer in Mississippi. In January 1980, he substantially damaged the truck in an accident. Nicholson had collision insurance with Dairyland Insurance Company ("Dairyland"). Dairyland determined that the truck was a total loss and paid Nicholson accordingly. The truck was towed to a salvage dealer, Late Model Auto Parts, which sold the truck to L. R. Boyette.

L. R. Boyette hired Harris's Body Shop to repair the truck. Boyette used the truck after it was rebuilt; the evidence at trial indicated that Boyette occasion-

ally had trouble with the accelerator sticking. After several months, Boyette sold the truck to Rudolph Phillips. Phillips traded the truck to appellant in December 1980 for a smaller pickup truck. Appellant inspected the truck before acceptance, but was unaware of, and its initial inspection failed to reveal, the major structural reconstruction performed on it.

On December 30, 1980, appellee Clarence Campbell test drove the truck and indicated to the salesman that it jumped forward when he put it in gear. Campbell asked appellant's salesman to inspect it; the salesman reported that it was "OK." Campbell then purchased the truck.

On January 4, 1981, shortly after 11 p.m., Campbell picked up a friend outside the Mobile Infirmary in Mobile, Alabama. When he put the truck in gear, it accelerated forward, jumped the curb, and struck three nurses who were walking to their cars. One of them, Nancy Morris, was not injured and did not sue. Appellee Jacqueline Evans suffered relatively minor injuries. Sallie C. Hamilton, however, was killed almost immediately; the executors of her estate are appellees in this Court.

Hamilton's executors filed a wrongful death action pursuant to § 6-5-410, *Code of Alabama* (1975), which allows the recovery of only punitive damages, and Evans and Campbell each filed separate suits for damages against appellant based upon the fact that appellant had sold Campbell the truck. Appellant crossclaimed against Dairyland on the theory that Dairyland had wrongfully allowed the truck back into the stream of commerce after it had been declared a total loss in violation of § 32-8-83, *Code of Alabama* (1975).

Hamilton's executors and Evans later added Dairyland as a defendant.

The case came to trial on October 18, 1983 in the Circuit Court of Mobile County. On October 25, 1983, a jury awarded Hamilton's executors punitive damages of $1,000,000 in the wrongful death action against appellant and Dairyland. The jury also awarded Evans compensatory damages of $60,000 against both defendants, and awarded Campbell $350,000 in punitive and compensatory damages against appellant for fraud in connection with the sale of the truck. The primary basis for the plaintiffs' recovery from Dairyland was Dairyland's failure to remove the vehicle identification number plate and license plate from the truck as required by § 32-8-83, *Code of Alabama* (1975), before reselling it.

On appeal, the Supreme Court of Alabama affirmed the trial court's judgment with respect to appellant's liability, but the judgments on the verdicts against Dairyland, including those on the cross-claims of appellant, were reversed.

B. The Federal Questions Were Properly Presented

Appellant recognizes that it bears the burden to persuade this Court of its jurisdiction over this appeal in the absence of any express reference in the opinion of the court below to the federal constitutional provisions relied upon by appellant in that court. *Illinois* v. *Gates*, 462 U.S. 213, 218-20 (1983).

1. Presentation of the Federal Constitutional challenge to § 12-22-72, *Code of Alabama* (1975)

Question 1, challenging the constitutionality of § 12-22-72, *Code of Alabama* (1975), was presented to the court below in the same fashion as was the challenge

to § 12-22-72 raised by the appellant in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986). As in *Aetna*, Question 1 was presented for the first time in appellant's brief filed in support of its Application for Rehearing, App. D, *infra*, 25a.[1] This was the logical time for appellant to present its challenge to § 12-22-72's constitutionality, since the non-discretionary imposition by the court below of the ten percent penalty on the $1,410,000 total judgment was not at issue or reduced to any appealable order until that judgment was affirmed.

Appellant's challenge to § 12-22-72 was properly and timely presented in complete conformity with relevant decisions of the Supreme Court of Alabama—a line of at least seventeen cases dating from 1861 in which the federal constitutionality of, or questions regarding the construction of, § 12-22-72 have been drawn into question at the rehearing stage.[2] In one such case,

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[1] Under Rule 20, Ala. R. App. P., "Assignments of error are not required. Statement of the issues presented on appeal in the appellant's brief as required by Rule 28 shall be sufficient." This Court has expressly relied upon presentation in briefs before the Supreme Court of Alabama in finding that a federal question was properly presented. *NAACP* v. *Alabama*, 377 U.S. 288, 293 n.4 (1964).

[2] The Supreme Court of Alabama has routinely permitted constitutional and statutory questions regarding § 12-22-72 to be raised in an Application for Rehearing or an equivalent post-judgment motion. *See Brown Mech. Contractors, Inc.* v. *Centennial Ins. Co.*, 431 So.2d 932 (Ala. 1983); *First Alabama Bank of Montgomery, N.A.* v. *Martin*, 425 So.2d 415 (Ala. 1983); *Chapman* v. *Rivers Const. Co.*, 284 Ala. 633, 227 So.2d 403 (1969); *City of Troy* v. *McLendon*, 279 Ala. 553, 188 So.2d 281 (1966); *Goodyear Tire & Rubber Co.* v. *Downey*, 266 Ala. 344, 96 So.2d 278 (1957); *Patterson* v. *Gains*, 264 Ala. 184, 85 So.2d 893

§ 12-22-72 was challenged under the Equal Protection Clause for the first time in an Application for Rehearing in the Supreme Court of Alabama. Without any suggestion that raising the issue at that stage was in any way improper or inconsistent with Alabama practice, the Supreme Court of Alabama, consistent with its routine practice, entertained (and rejected) the federal constitutional challenge to § 12-22-72 on the merits. *Central of Georgia Railway Co.* v. *Steed*, 287 Ala. 64, 76-77, 248 So.2d 110, 120-21 (1979).

It is also important to note that the Supreme Court of Alabama did not in this case—as it might have done—*deny* appellant's Application for Rehearing, an action which would have indicated that appellant's challenge to § 12-22-72 had not been timely presented. Instead, the court below *overruled* appellant's application, an action which, under the practice of the court below, indicates that the court reached and rejected appellant's challenge to § 12-22-72 on the merits. *See, e.g., Hamm* v. *Harrigan*, 278 Ala. 521, 179 So.2d 154 (1965), *cert. denied*, 382 U.S. 981 (1966); *Thompson* v. *State*, 268 Ala. 483, 489, 107 So.2d 890, 895 (1959).

(1956); *Lloyd* v. *Stewart*, 258 Ala. 627, 64 So.2d 884 (1953); *Childress* v. *Younger*, 258 Ala. 219, 61 So.2d 808 (1952); *City of Birmingham* v. *Bowen*, 254 Ala. 41, 47 So.2d 174 (1950); *Atlanta, Birmingham & Coast R. Co.* v. *Cary*, 250 Ala. 675, 35 So.2d 559 (1948); *Carter* v. *Carter*, 247 Ala. 409, 24 So.2d 759 (1945); *Snellings* v. *Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934); *Dent* v. *Foy*, 210 Ala. 160, 97 So. 627 (1923); *Montgomery Light & Water Power Co.* v. *Thombs*, 204 Ala. 678, 87 So. 205 (1920); *New York Life Ins. Co.* v. *Reese*, 201 Ala. 673, 79 So. 245 (1918); *Lawrence* v. *Jones*, 37 Ala. 388 (1861).

In light of this longstanding and consistent practice, the action below in overruling appellant's Application for Rehearing without any opinion must be deemed by this Court as having implicity upheld the constitutionality of § 12-22-72; that action was presumptively not based on lack of proper presentation of this question.[3] This Court long ago made abundantly clear that a state court's procedural rules governing presentation of federal questions will not bar this Court's power to review such questions unless those rules are "strictly or regularly" followed. *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964). Here, the rule in Alabama that has been "regularly" followed itself establishes that appellant challenged § 12-22-72 in a timely fashion.[4]

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[3] The only rule of appellate procedure directly relevant to appellant's challenge to the constitutionality of § 12-22-72 is Rule 44, Ala. R. App. P., which requires that the Attorney General of Alabama be served with a copy of the "written brief" raising the constitutional challenge. Appellant complied with this Rule. App. D, *infra*, 31a.

[4] Appellant would also bring an additional point to this Court's attention. Appellant presented its challenge to § 12-22-72 in a manner indistinguishable from the challenge to the same statute raised by the petitioner in *Burlington Northern R. Co.* v. *Woods*, No. 85-1088, *cert. granted*, March 24, 1986 ("*Burlington Northern*"). In granting that petition for writ of certiorari in the face of an order of the Eleventh Circuit which did not address the merits of petitioner's constitutional challenge to § 12-22-72, Pet. for Cert., at A-1, this Court necessarily recognized that, as a matter of logic and practice, a challenge to Alabama's appeal penalty statute should be brought only after a money judgment has been affirmed. Although the question when a challenge to § 12-22-72 must be raised in order to be considered by the court below is technically an issue of Alabama law, appellant's assertion that such a challenge should be raised by post-affirmance

2. Presentation of the Federal Constitutional Challenge to the Excessiveness of the Punitive Damage Awards

The excessiveness of the punitive damage awards was first challenged by appellant on November 23, 1983 in its post-trial Motion for Judgment Nothwithstanding the Verdict, or in the Alternative, For a New Trial. App. F, *infra*, 36a. The substance of Question 2 was also raised in the Brief of Appellant filed with the Supreme Court of Alabama on June 14, 1984. In appellant's brief to that court, it argued that "where the only culpable conduct claimed against Treadwell was that they failed to discover a latent defect and sold the vehicle in its allegedly defective condition, then the sheer size of this judgment is completely out of proportion to any conceivable wrong done by this Defendant." App. G, *infra*, 44a. Question 2 was presented once again in appellant's brief in support of its Application for Rehearing; in that brief

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motion is not only not contradicted by any case in the court below, but is also recognized as appropriate by the only other court which has been called upon to apply § 12-22-72. Thus, the Eleventh Circuit has entertained and decided in post-affirmance proceedings various questions arising out of applications of § 12-22-72 to diversity cases coming to it on appeal from the federal district court in Alabama. *See, e.g., Burlington Northern, supra.*

The same understanding also governs with respect to challenges to Mississippi's virtually identical appeal penalty statute, *Miss. Code Ann.* § 11-3-23 (Supp. 1982), in both the Mississippi courts, *see, e.g., Wallace* v. *Jones*, 360 So.2d 932 (Miss. 1978) (federal constitutional challenge in post-affirmance proceeding to § 11-3-23 entertained and decided against the challenge), and the Fifth Circuit, *see, e.g., Affolder, Inc.* v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984) (on motion to assess damages for appeal; motion denied); *Walters* v. *Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984) (post-affirmance motion in district court to assess penalty; motion granted).

appellant, for the first time, expressly relied on the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment in support of its argument. App. D, *infra*, 26a. Thus, the question raised at the rehearing stage was no more than an "enlargement" of the previous challenges to the excessiveness of the punitive damage awards, *Dewey* v. *Des Moines*, 173 U.S. 193, 197-98 (1899), and appellant is entitled to this Court's review of that question.

Furthermore, no Alabama statute, or rule of civil or appellate procedure, precludes raising new questions in an Application for Rehearing after the announcement of a decision of the Supreme Court of Alabama. Thus, as in Mississippi, *see Hathorn* v. *Lovorn*, 457 U.S. 255, 263 n.13 (1982), the issue is resolved by reference to the actual practice of the Supreme Court of Alabama established by decisional law of that court.

It is clear that the court below does, as a matter of its own practice, entertain and decide constitutional questions raised for the first time in an Application for Rehearing. In addition to the seventeen cases cited in note 2 and accompanying text, *supra*, the court below has entertained and decided a wide variety of new questions raised in petitions for rehearing over many years.[5] Indeed, even where the court below sug-

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[5] *Louisville & Nashville Ry. Co.* v. *Western Union Telegraph Co.*, 195 Ala. 124, 71 So. 118 (1916); *Dunn* v. *Dean*, 196 Ala. 486, 71 So. 709 (1916); *Copeland* v. *Pope*, 198 Ala. 257, 73 So. 490 (1916); *Gibbons* v. *Gibbons*, 205 Ala. 636, 88 So. 833 (1921); *Martin Building Co.* v. *Imperial Laundry Co.*, 220 Ala. 90, 124 So. 82 (1929); *Consolidated Coal Co.* v. *State*, 236 Ala. 489, 183

gests that it cannot or will not pass on new questions raised at the rehearing stage, it frequently will proceed to pass on such questions. *See Lovett* v. *Uptain*, 450 So.2d 113, 116 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116, 118 (Ala. 1984); *King* v. *Reid*, 428 So.2d 611, 615 (Ala. 1983); *Kirkland* v. *Kirkland*, 281 Ala. 42, 49, 198 So.2d 771, 777 (1967); *Ex parte Hanna*, 267 Ala. 527, 103 So.2d 720 (1958).

Thus, under these circumstances even an express ruling by the court below denying appellant's Application for Rehearing on procedural grounds would not have extinguished this Court's power to decide these federal constitutional questions under this Court's decision in *Barr* v. *City of Columbia*, 378 U.S., at 149, which requires that procedural barriers to consideration of federal questions be "strictly or regularly followed" in order to deprive this Court of power to review substantial federal constitutional questions. There was, of course, no such express ruling below and, as pointed out above, the "overruling" of appellant's Application for Rehearing strongly suggests, standing alone, that appellant's constitutional questions were rejected on their merits.

As this Court has recently stated, "State courts may not avoid deciding federal issues by invoking

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So. 650 (1938); *Huie* v. *Smith*, 236 Ala. 516, 183 So. 661 (1938); *Federal Land Bank of New Orleans* v. *Williams*, 237 Ala. 318, 186 So. 689 (1939); *Dodson* v. *Beaird*, 237 Ala. 587, 187 So. 862 (1939); *Sisson* v. *Swift*, 243 Ala. 289, 9 So.2d 891 (1942); *Goodgame* v. *Dawson*, 242 Ala. 499, 7 So.2d 77 (1942); *Rudolph* v. *Rudolph*, 251 Ala. 317, 36 So.2d 902 (1948); *Howell* v. *Roueche*, 263 Ala. 83, 81 So.2d 297 (1955); *Bienville Mortgage Corp.* v. *Mayo*, 286 Ala. 675, 245 So.2d 819 (1971).

procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn* v. *Lovorn*, 457 U.S., at 263. Indeed, this Court's decision in *Hathorn* suggests that a state court's *past* consistent practice of refusing to consider new issues raised on rehearing will not preclude review of federal constitutional questions by the Court where the *current* practice of that state court is to consider such issues. *Hathorn* v. *Lovorn*, 457 U.S., at 263-64 & nn.13-14. It is clear that the Supreme Court of Alabama has not in the past, nor does it now, consistently refuse to consider issues raised for the first time in an Application for Rehearing.[6]

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[6] *See* notes 2 & 5, *supra*. This Court's suggestion to the contrary in *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983), is neither dispositive of this issue nor can its suggestion in *Exxon* be reconciled with its holding in *Hathorn* v. *Lavorn*, *supra*. In the *Exxon* case, this Court declined to reach the question whether the Alabama statute at issue was preempted by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq.* (1976 ed. and Supp. V) ("EPAA"). In doing so, the Court observed that the "general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." 462 U.S., at 181 n.3. This observation, however, was made without any briefing of this issue by any of the parties before the Court. Appellant has brought to the attention of this Court in this Jurisdictional Statement thirty-five cases in the court below in which issues raised for the first time *on rehearing* have been decided on the merits.

Appellant's point is not academic. For example, one of the cases relied on in footnote 3 of *Exxon* was *Burton* v. *Burton*, 379 So.2d 617, 618 (Ala. Civ. App. 1980), in which, because it had not been raised in a timely fashion, the Court of Civil Appeals refused to decide an equal protection challenge similar to that decided by this Court in *Orr* v. *Orr*, 440 U.S. 268 (1979). That same court had previously refused to entertain a similar

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

The substantiality of the federal questions to be presented in this appeal is established by the argument presented to this Court by the appellant in *Aetna* as to Questions 1 and 4 in that case, and by this

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challenge for the same reason in *Hughes* v. *Hughes*, 362 So.2d 910 (Ala. Civ. App.), and the Supreme Court of Alabama dismissed a petition for a writ of certiorari. *Hughes* v. *Hughes*, 362 So.2d 918 (Ala. 1978). Notwithstanding these actions by the Alabama courts, which were brought to the attention of this Court by the appellee in *Hughes*, Motion to Dismiss or Affirm, at 2, this Court took jurisdiction over the appeal in *Hughes* and vacated the judgment of the court below. *Hughes* v. *Hughes*, 441 U.S. 901 (1979). The *Exxon* Court's citation of *Burton* cannot be reconciled with the Court's action in *Hughes* any more than its assumption in *Exxon* regarding the general practice of the Alabama courts can be reconciled with the many cases now brought to the Court's attention by appellant. The Court's action in *Exxon* can, however, be explained by reference to the suggestion of the Solicitor General in *Exxon* that because the issue of preemption under the EPAA had not been raised in the trial court, the record before the Court was factually deficient for purposes of deciding that preemption issue. Br. for the United States and the Federal Energy Regulatory Commission as *Amici Curiae* Supporting Reversal, at 12 n.10. There is no such deficiency here.

The other two cases in the court below relied upon in footnote 3 of *Exxon*, *State* v. *Newberry*, 336 So.2d 181, 183 (Ala. 1976), and *State* v. *Graf*, 280 Ala 71, 72, 189 So.2d 912, 913 (1966), do not pronounce a rule of general applicability; rather, they apply a distinct rule under which the State, in condemnation proceedings, is precluded from raising certain issues on appeal if it has not challenged the damages awarded for the particular taking involved. Thus, those two cases are readily distinguishable as involving a "special rule." *Hathorn* v. *Lovorn*, 457 U.S., at 263 n.13.

Court's grant of certiorari in *Burlington Northern* as to the constitutionality of Alabama's appeal penalty statute. Accordingly, because the Court is already quite familiar with the questions involved, appellant will only briefly set forth its arguments that the questions are substantial.

A. The Unconstitutionality of § 12-22-72, *Code of Alabama* (1975)

Under § 12-22-72, *Code of Alabama* (1975), a defendant-appellant, like appellant here, is subjected to an automatic, non-discretionary ten percent penalty payable to the appellee upon affirmance of a money judgment without regard to the novelty or complexity of the factual or legal issues presented in a particular appeal.

If § 12-22-72 is designed to prevent frivolous appeals, it is both indiscriminately overinclusive and unreasonably severe, because it punishes those who pursue non-frivolous appeals in an extravagant sum totally unrelated to the costs imposed by that appeal on the appellee. At the same time, it is irrationally underinclusive because a plaintiff who fails to recover a money judgment at trial may take an unsuccessful appeal on wholly frivolous grounds without the risk of any comparable penalty whatsoever.[7]

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[7] Under Rule 38, Ala. R. App. P., both plaintiffs and defendants who take appeals in civil cases are treated in an evenhanded manner as regards the *damages* and *costs* incurred in defending a judgment that is appealed either by plaintiffs or defendants where the judgment below is affirmed and the appeal is determined to have been frivolous. This rule, in sharp contrast to § 12-22-72, adequately fulfills the legitimate state purpose of curbing abuse of the right to appeal and serves to accentuate the arbitrariness of § 12-22-72.

Appellant will argue to the Court that this statute, which exists in the same non-discretionary form in only one other State, Mississippi, is irreconcilable with, and therefore must be struck down under, this Court's decision in *Lindsey* v. *Normet*, 405 U.S. 56 (1972). In *Lindsey*, this Court invalidated an Oregon statute that required a particular class of losing defendants, tenants, to post a double bond in order to appeal from a judgment in favor of their landlord. The Court stated that a State may act "to discourage patently frivolous appeals . . . if [its] rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." *Id.*, at 78. Section 12-22-72 fails both these tests.

If, as the Aetna Life Insurance Company argued to this Court in No. 84-1601, and as the Burlington Northern Railroad Company argues in its petition for certiorari in No. 85-1088, § 12-22-72 functions to deny losing appellants an equal opportunity to pursue their right of statutory appeal within the Alabama courts and the right of appeal within the federal court system in diversity cases, then the need for this Court to address this question is manifest.[8]

B. The Excessive Fines and Due Process Clause Question

The question whether the Excessive Fines Clause applies to a punitive damage award that is grossly

[8] If this Court were to decide in *Burlington Northern* that § 12-22-72 is "procedural" for purposes of the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and that therefore the penalty assessed under § 12-22-72 against Burlington Northern was wrongly assessed on that ground, this Court would presumably not reach Question 1 presented in Burlington Northern's petition for certiorari--whether § 12-22-72 is unconstitutional under the Fourteenth Amendment.

disproportionate to punishments imposed by the State of Alabama for analogous criminal conduct was briefed and argued in *Aetna Life Insurance Co.* v. *Lavoie*, *supra*. The arguments advanced to the Court by the appellant in *Aetna* are fully relevant to this case.

As this Court's decision in *Solem* v. *Helm*, 463 U.S. 277 (1983), establishes, the historical roots of the Excessive Fines Clause and the "principle that a punishment should be proportionate to the crime" may be traced back to Magna Carta's regulation of "excessive amercements." 463 U.S., at 284. Indeed, as the Court observed in *Solem*, the guarantees in Magna Carta against the imposition of excessive fines were not "hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments." *Id.*, at 285. The case relied on by the Court to support that statement, *Le Gras* v. *Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 Selden Society 3 (1934), illustrates the application of the excessive amercement principle of Magna Carta to a fine imposed in a civil proceeding. That principle, incorporated into the English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, Ch. 2, and subsequently into the Virginia Declaration of Rights (1776), was then enshrined in the Eighth Amendment by its Framers. *Solem* v. *Helm*, 463 U.S., at 285 & n.10.

There is no disagreement in this Court with the proposition that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham* v. *Wright*, 430 U.S. 651, 669 n.37 (1977); *id.*, at 685 (White, J.,

dissenting). If the imposition of a large fine in order to punish and deter others is not sufficiently analogous to a criminal punishment for the Eighth Amendment to apply, serious doubt would be cast on the continuing vitality of cases such as *Trop* v. *Dulles*, 356 U.S. 86 (1958), and *In re Gault*, 387 U.S. 1 (1967), which have been cited by this Court as examples of punishment administered in non-criminal proceedings to which the Eighth Amendment is applicable. *Ingraham* v. *Wright*, 430 U.S., at 669 n.37 & 671-72 n.40.

The punitive damages awarded here include $1,000,000 to Hamilton's estate pursuant to Alabama's wrongful death statute, § 6-5-410, *Code of Alabama* (1975), and undoubtedly a substantial portion of the $350,000 award to appellee Campbell.[9] It is clear under the law of the court below that punitive damages imposed pursuant to § 6-5-410 are imposed for the sole purposes of punishment and deterrence. *See, e.g.*, *Carter* v. *City of Birmingham*, 444 So.2d 373 (Ala. 1983), *cert. denied*, 467 U.S. 1211 (1984); *State*

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[9] The trial court instructed the jury that the executors of Ms. Hamilton's estate could recover only punitive damages. App. H, *infra*, 49a. The jury was also instructed that appellee Campbell could be awarded punitive damages on his fraud count and compensatory damages on his other counts. App. H, *infra*, 49a. Since the jury awarded appellee Evans, who was struck by appellee Campbell's truck and injured, $60,000 in compensatory damages, the $350,000 award to appellee Campbell, who experienced no direct physical injury, was presumably primarily punitive damages. That determination is, in any event, a matter of state law which will have to be decided on remand of this case to the Alabama courts if this Court holds that the Excessive Fines Clause is applicable to the punitive damage awards in this case.

Docks Commission v. *Barnes*, 225 Ala. 403, 143 So. 581 (1932).[10] Similarly, punitive damages awarded in fraud cases, customarily referred to by the court below as "sweat money," are intended to punish the defendant and to set an example to others who may have contemplated similar actions. *Aspinwall* v *Gowens*, 405 So.2d 134, 137 (Ala. 1981); *Old Southern Life Insurance Co.* v. *Woodall*, 348 So.2d 1377, 1383 (Ala. 1977); *Loch Ridge Construction Co., Inc.* v. *Barra*, 291 Ala. 312, 317, 280 So.2d 745, 751 (1973).[11]

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[10] Prior to 1852, and consistent with English common law, there could be no monetary recovery in Alabama for wrongful death. Sections 1938-1941, *Code of Alabama* (1852), however, provided for recovery of damages which were strictly compensatory and limited to a maximum of $3,000. The act of February 21, 1860 repealed §§ 1938-39 and substituted a provision making damages recovered punitive such "as the jury may deem just." By oversight, this act was never codified and §§ 1938 and 1939 were retained. *See Cofer* v. *Ensor*, 473 So.2d 984, 991 (Ala. 1985). In 1872, the Alabama legislature enacted "an Act to prevent homicides." Pamph. Acts 83 (February 5, 1872). This statute was in all material respects identical to the former act, and was codified. § 2641, *Code of Alabama* (1876).

As demonstrated in the text above, § 6-5-410 has been construed to allow for the recovery of only punitive damages. Thus, Alabama would appear to be the only State with a purely penal wrongful death statute. *See* Prosser & Keeton on The Law of Torts 946 (5th ed. 1984).

[11] These characterizations of the purposes of these types of punitive damage awards pretermits the need for the kind of searching inquiry into the intent behind the authorization for a particular fine or punishment that has normally accompanied this Court's decisions applying constitutional provisions such as the Bill of Attainder Clause to cases involving neither a criminal trial as such nor incarceration. *See, e.g., United State* v. *Lovett*, 328 U.S. 303 (1946).

These punitive damage awards are grossly disproportional to the wrong they seek to punish. The legislature of Alabama has determined, through enactment of criminal statutes related to business fraud and conspiracy, that persons convicted of business fraud and conspiracy after enjoying the full protections of the Sixth and Fourteenth Amendments should suffer a maximum monetary penalty of $1,500. §§ 13A-4-3, 13A-5-12 and 13A-9-41 *et seq.*, *Code of Alabama* (1975). Thus, the punitive damages awarded appellee Campbell in this case are approximately 193 times the maximum punishment assessed by the Alabama legislature for business conduct of a similar nature which has been adjudicated to be a crime. Under those Alabama statutes, the fine imposed also would have been paid into the treasury of Alabama, whereas the award to appellee Campbell is nothing more than a windfall.

Likewise, the legislature of Alabama has enacted a criminal statute which punishes criminally negligent homicide;[12] if appellant had been convicted of crimi-

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[12] Because the $1,000,000 punitive damage award to Hamilton's estate was made pursuant to § 6-5-410, it arguably stands on slightly different footing than the punitive damage award to appellee Campbell because the latter award does not even arguably carry with it any express legislative authorization. Both awards, however, were the direct result of the exercise of unbridled discretion vested in the jury by the failure of the Alabama legislature or courts to set any discernible standards for the award of punitive damages or limits on those damages. The current version of Alabama's wrongful death statute, § 6-5-410, *Code of Alabama* (1975), expressly vests standardless, unlimited discretion in the jury. It states in pertinent part:

A personal representative may commence an action *and re-*

nally negligent homicide under that statute after enjoying the full protections of the Sixth and Fourteenth Amendments, the maximum monetary penalty that could be assessed against appellant would be $2,000. §§ 13A-5-12 and 13A-6-4, *Code of Alabama* (1975). Thus, the punitive damage award to Hamilton's estate in this case is 500 times the maximum punishment assessed by the Alabama legislature for conduct of a similar nature which has been adjudicated a crime. All of this award is a windfall to Hamilton's estate.

Whether addressed under the Excessive Fines Clause or directly under the Due Process Clause of the Fourteenth Amendment, the gross disproportionality of the fines in this case, exacerbated by the magnifying effect of the additional ten percent penalty imposed by § 12-22-72, *Code of Alabama* (1975), presents a substantial federal question. As a matter of common sense, such capricious penalties cannot and will not deter decisionmaking and conduct such as that at issue in this case. There is no significant state interest in meting out punishment in a civil proceeding "based upon the caprice and prejudice of jurors." *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). The apparent rule of law in Alabama is that punitive damage awards may be imposed in large and wholly whimsical sums by juries. Thus, for the routine conduct of business in Alabama

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cover such damages as the jury may assess . . . .

(Emphasis added.) Because § 6-5-410 does not provide any standard by which the jury should assess the amount of punitive damages to be awarded, the Supreme Court of Alabama has adopted the view that a presumption exists that a jury verdict rendered pursuant to § 6-5-410 is not excessive. *Deaton, Inc.* v. *Burroughs*, 456 So.2d 771, 776 (Ala. 1984).

businesses subject themselves to the imposition of enormous punitive damage awards by juries which have been given *carte blanche* by the Alabama courts to create and impose their own systems of fines in each and every case that goes to a jury.

The decision below is not an aberration. On November 15, 1985, the Supreme Court of Alabama affirmed, after remittitur, a judgment of $2,800,000 in punitive damages against General Motors Corporation for wrongful death in connection with an automobile crash. *General Motors Corp.* v. *Edwards*, 482 So.2d 1176 (Ala. 1985). In the absence of a decision by this Court holding that the Excessive Fines Clause controls punitive damage awards, the court below will continue to defer to the jury's unbridled discretion in awarding excessive punitive damages.

This Court has the power and responsibility under the Eighth and Fourteenth Amendments to place constitutional restraints on such arbitrary awards. The punitive damage awards here are excessive both in kind, because they serve no valid state purpose, and in degree, because they are grossly disproportionate to the level of punishment imposed by the Alabama legislature for analogous criminal conduct.

CONCLUSION

Appellant's federal constitutional claims are substantial. Appellant has been fined an amount vastly out of proportion to the punishment which could have been imposed upon it under Alabama statutes punishing analogous criminal conduct, and it has been fined severely for exercising its statutory right to appeal that judgment to the State's highest court.

This Court had before it the substance of these issues in a virtually identical context in *Aetna Life Insurance Co.* v. *Lavoie*. In its decision in *Aetna*, this Court stated in unmistakable words that "these arguments raise important issues which, in an appropriate setting, must be resolved . . . ." Slip op., at 14. This case clearly presents an "appropriate setting" in which to resolve these important issues. Appellant has pressed its federal constitutional challenges to these punitive damage awards and to § 12-22-72 at every appropriate stage in this litigation.[13] Probable jurisdiction should be noted and this case set for argument.

May 7, 1986

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[13]Appellant is clearly entitled to have applied to this case any ruling of this Court on Question 1 as presented in *Burlington Northern* or this Court's ruling in any other case in which questions similar to those presented by appellant may be presented to and decided by this Court. *See, e.g., Henry* v. *Collins*, 380 U.S. 356 (1965) (*per curiam*) (application of constitutional rule announced in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to libel judgment on certiorari to Supreme Court of Mississippi); *Hughes* v. *Hughes*, 441 U.S. 901 (1979) (application of decision in *Orr* v. *Orr*, 440 U.S. 268 (1979), to case on appeal from Supreme Court of Alabama notwithstanding that Alabama courts had held federal question not timely presented).

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

THE STATE OF ALABAMA, JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1985-86

TREADWELL FORD, INC.

83-574

CLARENCE W. CAMPBELL; DAIRYLAND INS. CO.; KATHERINE CHAPMAN HAMILTON and FREDERICK B. HAMILTON, as Co-Executors of the Estate of SALLIE CHAPMAN HAMILTON, Deceased; and JACQUELINE EVANS

DAIRYLAND INSURANCE COMPANY

83-583

KATHERINE CHAPMAN HAMILTON and FREDERICK B. HAMILTON, as Co-Executors of the Estate of SALLIE CHAPMAN HAMILTON, Deceased; JACQUELINE EVANS; and Treadwell Ford, Inc.

FILED JAN 10, 1986

ALMON, JUSTICE.

These appeals are from consolidated cases in which judgments were entered on verdicts for the plaintiffs totalling $1,410,000. Sallie C. Hamilton and Jacqueline Evans were struck by a pickup truck driven by Clarence Campbell. Hamilton died as a result of her injuries. Her executors filed a wrongful death action, Code 1975, § 6-5-410, and Evans and Campbell each filed separate suits for damages against Treadwell Ford, Inc., which had sold Campbell the truck. Hamilton's executors and Evans later added as a defendant Dairyland Insurance Company, which had, prior

to the truck's coming into Treadwell's possession, paid a total loss claim on the truck and sold it to a salvage company.

The truck, a 1979 Ford F-100 pickup truck, was extensively damaged while insured by Dairyland. It was rebuilt after Dairyland sold it and before Treadwell purchased it. The alleged cause of the plaintiffs' accident was that the accelerator linkage stuck against the firewall, causing the truck to surge forward uncontrollably. The plaintiffs recovered from Treadwell on various theories relating to the alleged defect in the firewall. The primary basis of recovery from Dairyland was Dairyland's failure to remove the vehicle identification number (V.I.N.) plate and the license plate from the truck, as required by Code 1975, § 32-8-87, before reselling it. Dairyland was also sued under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD). Treadwell filed cross-claims against Dairyland in the death action and in Evans's action, and a third-party claim in Campbell's action. The jury returned verdicts for Treadwell on the cross-claims and for Dairyland on the third-party claim.

The history of the truck from its original purchase will explain Dairyland's and Treadwell's involvement. Gary Nicholson bought the truck new from a dealer in Mississippi in late 1979. In January 1980 he wrecked the truck by running into the rear end of a flatbed trailer truck. the front end of the truck suffered at least the following damages. The hood, fenders, and grill were crumpled, and the engine was driven back into the firewall. The bumper was attached to "bumper horns," metal brackets extending forward on the frame. The impact bent these bumper horns. The frame was bent somewhat and the post holding the hinges for the driver's door was knocked out of alignment.

Nicholson had collision insurance with Dairyland. After that first accident, the truck was towed to a salvage dealer, Late Model Auto Parts. Dairyland's appraiser determined

that the truck was a total loss and Dairyland paid Nicholson accordingly. Code 1975, § 32-8-87(b), at the time Dairyland processed the claim, required that

> "An insurance company which pays money as compensation for total loss of a motor vehicle shall obtain such vehicle's certificate of title, manufacturer's identification number plates and license plates and, with in 72 hours after receiving them, shall forward them to the department for processing."

The evidence was undisputed that Dairyland did not obtain the identification and license plates from Late Model. Instead, the certificate of title found its way to Late Model. John Ewing, Dairyland's senior claims examiner, testified by deposition that the file showed Dairyland sent the title certificate and a bill of sale to Late Model on June 11, 1980.

Late Model Auto Parts then sold the truck to L. R. Boyette. Boyette hired Jim Harris of Harris's Body Shop, to repair the truck by replacing the fenders, grill, radiator, and hood. Harris cut the original bumper horns off the frame and welded new ones in their place. He took the truck to a dealership and had the frame straightened. He realigned the driver's doorpost so the door closed properly. Harris testified that he did not replace the engine onto its mounts or do any work on the firewall. When he finished his body work, he completely repainted the truck in its original colors.

Boyette testified that, as he used the truck after it was rebuilt, he occasionally had trouble with the accelerator sticking, but that he could free it by tapping the gas pedal. Boyette sold the truck after a few months to Rudolph Phillips. Phillips traded the truck to Treadwell Ford for a smaller pickup truck in December 1980.

Treadwell performed a complete inspection of the truck. Treadwell's mechanic, William Brooks, made the inspec-

tion. He testified that he put the truck on the lift so he could inspect it for oil leaks or frame damage and removed the wheels so he could inspect the brakes. He also inspected the transmission, the engine, the body,and the interior and test-drove the truck. He testified that one of the objects of the inspection was to see if the truck had been wrecked. Brooks testified that he noticed that the truck had been repainted, but that he did not see the welds on the new bumper horns, the damage to the firewall, or any other evidence of the reconstruction. The truck passed the inspection for Ford's Extended Service Policy on used vehicles.

Campbell bought the truck from Treadwell on December 30, 1980. He testified that when he test-drove the truck, he experienced a problem with the truck jumping forward when he put it in gear, so that when he returned to the Treadwell lot, he asked the salesman, Charles Stevens, to inspect the truck. Campbell left to withdraw the money for the truck from his bank account. He testified that when he returned, the salesman told him the truck had been inspected and was "OK," so he bought the truck. Five days later, the accident in question occurred.

The accident causing the plaintiffs' injury occurred shortly after 11 p.m. on January 4, 1981, in the parking lot of the Mobile Infirmary in Mobile, Alabama. Campbell was sitting in the truck, which he had bought five days earlier at Treadwell's used car lot, waiting to give a ride to a friend. When she got in the truck, he put it in gear and it accelerated forward, jumped the curb, and struck three nurses who were walking to their cars. One of them, Nancy Morris, was not injured. Evans's injuries were relatively minor. Hamilton died almost immediately. Campbell became ill and vomited after the accident.

Campbell testified that the truck "took off in a flash" and that the brakes would not stop it. The plaintiffs called as an expert witness an accident reconstruction specialist,

who testified that the damage still visible indicated that the engine broke off its mounts in the first accident and slid backwards into the firewall. He also stated that the bracket holding the accelerator rod had an old crack that, in his professional opinion, was probably caused by the first accident. The expert testified that the cracked bracket allowed the accelerator rod to move sideways and occasionally bind against the firewall. He demonstrated that the rod and the firewall showed wear that was consistent with this theory. The expert gave his opinion that the damage from the first accident caused the accelerator to stick and caused the accident which is the subject of this suit. Further, the expert testified that brake failure is common in cases of uncontrolled acceleration.

The jury awarded Hamilton's executors $1,000,000 in the death action against Treadwell and Dairyland, awarded Evans $60,000 against both defendants, and awarded Campbell $350,000 against Treadwell. Campbell claimed damages for physical illness and emotional anguish, and punitive damages for fraud.

ISSUES RAISED BY TREADWELL

Treadwell[1] raises the following principal issues: (1) the trial court should not have submitted the cases to the jury on the Alabama Extended Manufacturer's Liability; (2) the evidence did not support a finding that Treadwell negligently inspected the truck; and (3) the evidence did not support Campbell's claim of fraud.

Alabama Extended Manufacturer's Liability Doctrine

Treadwell argues that the trial court erred in denying its motion for directed verdict on the Alabama Extended Manufacturer's Liability Doctrine counts of the complaints. See *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128 (Ala.

[1] *Both appellants have retained additional counsel on appeal.*

1976); and *Atkins v. American Motors Corp.*, 335 So. 2d 134 (Ala. 1976). Treadwell contends it is not subject to liability under the AMELD for any of several reasons, including its argument that the AMELD does not apply to sellers of used vehicles.

The record reveals, however, that Treadwell's motion for directed verdict did not specifically include a challenge to this cause of action.

> "[I]f a complaint has more than one count and the defendant believes that the evidence is not sufficient to support one or more of those counts, he must challenge this by motion for directed verdict, specifying the count which is not supported by the evidence. If this is not done and all counts go to the jury and a general verdict is returned, the court will presume that the verdict was returned on a valid count."

Aspinwall v. Gowens, 405 So. 2d 134, 138 (Ala. 1981); *Cincinnati Ins. Co. v. Little*, 443 So. 2d 891 (Ala. 1983).

One of the grounds alleged in the directed verdict motion was that Treadwell's conduct had no causal relation to the plaintiffs' injuries. Treadwell asserts that "causal relation" is a term of art within the AMELD and so should be considered as directing the trial court's attention to the impropriety of submitting this count to the jury. This argument cannot succeed, however, because every cause of action entails a causal relation between the wrong committed and the harm suffered. The mere use of this phrase in a generalized motion for directed verdict is not sufficient to overcome the rule quoted above.

Negligence

Treadwell argues that the defect in the firewall that caused the accelerator to stick was latent and that Treadwell had no duty to inspect for latent defects. *Lindsey v.*

International Shoe Co., 45 Ala. App. 566, 233 So. 2d 507 (1970); *Stamper v. Parr-Ruckman Home Town Motor Sales, Inc.*, 25 Ohio St. 2d 1, 265 N.E.2d 785 (1971); *Landry v. Baton Rouge Lumber Co.*, 434 So. 2d 1144 (La. Ct. App. 1983).

The evidence of record presents, however, a jury question as to whether the defect was patent or latent. Treadwell undertook a duty to inspect for damage from prior wrecks. There was substantial evidence that Treadwell negligently performed this duty.

Photographs admitted into evidence show extensive damage to the firewall. It would be reasonable for the jury to conclude that this damage would have been easily discoverable. Treadwell performed a thorough inspection for the sake of offering Ford's Extended Service Policy and represented that the truck passed this inspection. The mechanic who performed this inspection testified that damage from previous wrecks was one of the main things he looked for. The judgment on the jury's finding that Treadwell negligently failed to discover the defect is due to be affirmed.

Fraud

Treadwell further contends that the only representation it made was that the truck was "OK," which is mere puffery and not a statement of fact which would support a finding of fraud. *Lucky Mfg. Co. v. Activation, Inc.*, 406 So. 2d 900 (Ala. 1981); *Harrell v. Dodson*, 398 So. 272 (Ala. 1981); *Ray v. Montgomery*, 399 So. 2d 230 (Ala. 1980). Campbell replies that the context in which the statement was made shows otherwise. He testified that when he test-drove the truck it was jumping forward when he started off. He thought the problem might just be his unfamiliarity with the truck, but he asked the salesman to have it checked out while he went to the bank to withdraw the purchase money.

In this context, the jury could have taken the statement that the truck was "OK" as a representation that Treadwell had inspected the truck for a problem with the accelerator and found nothing wrong. The jury could have inferred from the obviousness of the damage to the firewall that Treadwell's salesman made an intentional misrepresentation in making this statement. On the basis of this evidence, the jury could have concluded either that Treadwell had not properly inspected the truck but told him it had, or that Treadwell had inspected and found the firewall damage, but failed to inform Campbell of the damage. Thus the evidence supports a finding of intentional misrepresentation sufficient to support an award of punitive damages.

Treadwell also argues that Campbell failed to prove that he relied on the alleged misrepresentation, because he had already decided to buy the truck before the statement was made. Campbell's request for a further inspection of the truck logically makes any acceptance at that time conditional, depending upon a favorable report after the inspection. Thus, there was evidence that the final decision to purchase came after the statement that the truck was "OK." Moreover, Treadwell, in connection with offering the Extended Services Policy, made a representation that Treadwell had thoroughly inspected the truck and found nothing wrong. As discussed above, the jury could have found from the evidence that this representation was false. The jury could also have found that Campbell relied upon this misrepresentation in purchasing the truck. Thus, the record supports a finding of reliance by Campbell.

Finally, Treadwell argues that the evidence does not support a finding of fraud because Campbell was not pressured into accepting the truck, but rather was told that he could take the truck to a mechanic of his choosing for an inspection. Treadwell cites by analogy *Hopper v. Curry*, 408 So. 2d 83 (Ala. 1981). In *Hopper* the seller of land told the purchasers that he thought the parcel was 40

acres, but that they could have it surveyed to find out. When it later turned out to be only 30 acres, they sued for fraud. This Court affirmed the judgment in favor of the seller becaused the purchases failed to accept the seller's offer to have the property surveyed.

Treadwell, however, actively represented that it had thoroughly inspected the truck and found it to be in good working condition—such good condition that it was willing to offer Campbell its one-year service contract by which Ford would pay for repairs. Treadwell, by inspecting the truck, had more basis for knowledge as to the representation than the seller in *Hopper*, who did not say he had had the property surveyed. Furthermore, when Campbell asked Stevens to further inspect the truck, Stevens agreed to do so and told campbell later that Treadwell's mechanic had inspected the truck and that it was "OK." Thus, this case is different from *Hopper* in two respects. Treadwell made a more definitive statement than the seller in *Hopper* did. Treadwell, unlike the seller in *Hopper*, also agreed to perform an inspection and then, the jury could have found, misrepresented the results of the inspection.

Stevens testified that Treadwell normally charged customers for the Extended Service Policy, but that Campbell received the policy at no additional charge. Campbell was justified in relying on Treadwell's statements about the condition of the truck.

Treadwell raises other issues which we have received and determined not to present reversible error.

ISSUES RAISED BY DAIRYLAND

Violation of Motor Vehicle Title Law

Dairyland's first issue raises the question of liability based on Dairyland's violation of the Alabama Uniform Certificate of Title and Antitheft Act, Code 1975, § 32-8-1 et seq.

Dairyland violated § 32-8-87(b), *supra*, by failing to obtain the V.I.N. and license plates from the truck and send them, together with the certificate of title, to the Department of Revenue. This violation is a misdemeanor. § 32-8-13. The legislature substantially amended § 32-8-87 after the time of this accident. Act No. 85-650, 1985 Ala. Acts 1010. We express no judgment whether these changes would affect the kind of liability sought to be imposed upon Dairyland if the case had been based on failure to comply with the Act after the effective date of this amendment.

The complaints in the Hamilton and Evans cases included counts alleging that Dairyland's violation of this Code section constituted negligence which proximately caused the plaintiffs' injuries. Treadwell alleged in its cross-claims and third-party claim that Dairyland's failure to comply with the Act constituted negligence or a misrepresentation of the condition of the truck. We do not address the question of whether the cross-claims and the third-party claim are viable or are prohibited attempts at compensation among joint tort-feasors, in view of our resolution of the issues on the merits of the plaintiffs' claims in favor of Dairyland.

The trial court instructed the jury that Dairyland's violation of this Act was negligence as a matter of law, that the plaintiffs were within the class of persons intended to be protected by the Act, and that the jury was to decide whether Dairyland's violation of the Act was the proximate cause of the accident. Dairyland objected to these instructions.

Before the violation of a statute can be taken as evidence of negligence as a matter of law in a civil action, the plaintiff must show that the statute was designed to protect the class of persons of which the plaintiff has suffered, that the defendant violated the statute, and that the violation proximately caused the injury. *Fox v. Bar-*

tholf, 374 So. 2d 885 (Ala. 1982); *Murray v. Alabama Power Co.*, 413 So. 2d 1109 (Ala. 1982).

The Act was not enacted to prevent motor vehicle accidents, but to prevent motor vehicle thefts. The very title states that it is an antitheft act. The overall plan of the Act shows exclusive attention to maintaining records of the identity and ownership of vehicles.

Hamilton's executors, Evans, and Treadwell advance the argument that, because the Act calls for an inspection of a "total loss" vehicle before the issuance of "rebuilt" identification plates, §§ 32-8-48, -35, the Act provides for a safety inspection to protect subsequent purchasers from dangerous, defectively rebuilt vehicles. The inspection is made by the Department of Revenue, however, not the Department of Safety (a point confused by the trial court in its instructions). A reading of § 32-8-35 shows that the inspection is for the purpose of determining that the vehicle for which new plates are being sought is the one described in the application for a new certificate of title.

Of course, if the Act was not intended to prevent the sort of injury complained of here, it cannot have been enacted to protect accident victims. It was enacted to protect owners of vehicles from thefts. See *State v. Spurlock*, 393 So. 2d 1052 (Ala. Crim. App. 1981).

For the foregoing reasons, violation of the Act did not subject Dairyland to liability for negligence. Treadwell has waived any claim that violation of the Act subjected Dairyland to liability for misrepresentation as alleged in Treadwell's claims against Dairyland, because that theory was not submitted to the jury in the court's instructions and has not been argued here.

AEMLD

Dairyland is entitled to a reversal on the AEMLD because that doctrine does not impose liability on Dairyland

under the facts of this case. The principles of liability under the AEMLD are stated in *Casrell, supra*, as follows:

> "(1) he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if
>
> "(a) the seller is engaged in the business of selling such a product, and
>
> "(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."

335 So. 2d at 132-33. The decision in *Atkins* added a discussion on the affirmative defense of lack of causal relation:

> "*Causal Relation.* The defendant may establish that there is no causal relation in fact between his activities in connection with handling the product and its defective condition. For example, the defendant may show that he is in the business of either distributing or processing for distribution finished products; he received a product already in a defective condition; he did not contribute to this defective condition; he had neither knowledge of the defective condition, nor an opportunity to inspect the product which was superior to the knowledge or opportunity of the consumer."

335 So. 2d at 143 (footnote omitted).

Clearly, the AEMLD does not apply to the seller of a used, wrecked vehicle for salvage. Dairyland had nothing to do with the repair work, nor did Dairyland sell or attempt to sell other than a junkyard for salvage. This is to far afield of the sellers in the chain of marketing a new product to be reached by the Alabama Extended Manufacturers' Liability Doctrine.

For the foregoing reasons, the judgments on the verdicts against Treadwell are affirmed, and the judgments on the verdicts against Dairyland, including those on the cross-claims, are reversed, and the cause remanded.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

All the Justices concur.[2]

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[2] Justice Houston, not being on the Court at the time of submission, has listened to the tape or oral arguments and studied the record and briefs.

APPENDIX B

Treadwell Ford, Inc. v. Campbell
873-574 & 83-583
FILED
March 7, 1986

expert witness an accident reconstruction specialist, who testified that the damage still visible indicated that the engine broke off its mounts in the first accident and slid backwards into the firewall. He also stated that the bracket holding the accelerator rod had an old crack that, in his professional opinion, was probably caused by the first accident. The expert testified that the cracked bracket allowed the accelerator rod had an old crack that, in his professional opinion, was probably caused by the first accident. The expert testified that the cracked bracket allowed the accelerator rod to move sideways and occasionally bind against the bent firewall. He demonstrated that the rod and the firewall showed wear that was consistent with this theory. The expert gave his opinion that the damage from the first accident caused the accelerator to stick and caused the accident which is the subject of this suit. Further, the expert testified that brake failure is common in cases of uncontrolled acceleration.

The jury awarded Hamilton's executors $1,000,000 in the death action against Treadwell and Dairyland, awarded Evans $60,000 against both defendants, and awarded Campbell $350,000 against Treadwell. Campbell claimed damages for physical illness and emotional anguish, and punitive damages for fraud.

ISSUES RAISED BY TREADWELL

Treadwell[1] raises the following principal issues: (1) the trial court should not have submitted the cases to the jury

[1] Both appellants have retained additional counsel on appeal.

on the Alabama Extended Manufacturer's Liability Doctrine; (2) the evidence did not support a finding that Treadwell negligently inspected the truck; and (3) the evidence did not support Campbell's claim of fraud.

Alabama Extended Manufacturer's Liability Doctrine

Treadwell argues that the trial court erred in denying its motion for directed verdict on the Alabama Extended Manufacturer's Liability Doctrine counts of the complaints. See *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128 (Ala. 1976); and *Atkins v. American Motors Corp.*, 335 So. 2d 134 (Ala. 1976). Treadwell contends it is not subject to liability under the AEMLD for any of several reasons, including its argument that the AEMLD does not apply to seller of used vehicles.

The record reveals, however, that Treadwell's motion for directed verdict did not specifically include a challenge to this cause of action.

> "[I]f a complaint has more than one count and the defendant believes that the evidence is not sufficient to support one or more of those counts, he must challenge this by motion for directed verdict, specifying the count which is not supported by evidence. If this is not done and all counts go to the jury and a general verdict is returned, the court will presume that the verdict was returned on a valid count."

Aspinwall v. Gowens, 405 So. 2d 134, 138 (Ala. 1981); *Cincinnati Ins. Co. v. Little*, 443 So. 2d 891 (Ala. 983).

One of the grounds alleged in the directed verdict motion was that Treadwell's conduct had no causal relation to the plaintiffs' injuries. Treadwell asserts that "causal relation" is a term of art within the AEMLD and so should

be considered as directing the trial court's attention to the impropriety of submitting this count to the jury. This argument cannot succeed, however, because every cause of action entails a causal relation between the wrong committed and the harm suffered. The mere use of this phrase in a generalized motion for directed verdict is not sufficient to overcome the rule quoted above.

Negligence

Treadwell argues that the defect in the firewall that caused the accelerator to stick was latent and that Treadwell had no duty to inspect for latent defects. *Lindsey v. International Shoe Co.*, 45 Ala. App. 566, 233 So. 2d 507 (1970); *Stamper v. Parr-Ruckman Home Town Motor Sales, Inc.*, 25 Ohio St. 2d 1, 265 N.E.2d 785 (1971); *Landry v. Baton Rouge Lumber Co.*, 434 So. 2d 1144 (La. Ct. App. 1983).

The evidence of record presents, however, a jury question as to whether the defect was patent or latent. Treadwell undertook a duty to inspect for damage from prior wrecks. There was substantial evidence that Treadwell negligently performed this duty.

Photographs admitted into evidence show extensive damage to the firewall. It would be reasonable for the jury to conclude that this damage would have been easily discoverable. Treadwell performed a thorough inspection for the sake of offering Ford's extended Service policy and represented that the truck passed this inspection. The mechanic who performed this inspection testified that damage from previous wrecks was one of the main things he looked for. The judgment on the jury's finding that Treadwell negligently failed to discover the defect is due to be affirmed.

Fraud

Treadwell further contends that the only representation it made was that the truck was "OK," which is mere puffery and not a statement of fact which would support a finding of fraud. *Lucky Mfg. Co. v. Activation, Inc.*, 406 So. 2d 900 (Ala. 1981); *Harrell v. Dodson*, 398 So. 2d 272 (Ala. 1981); *Ray v. Montgomery*, 399 So. 2d 230 (Ala. 1980). Campbell replies that the context in which the statement was made shows otherwise. He testified that when he test-drove the truck it was jumping forward when he started off, but that he thought the problem might just be his unfamiliarity with the truck. Campbell testified that Stevens "said that he would check it and see that it would be okay whenever we come back from downtown."

In this context, the jury could have taken the statement that the truck was "OK" as a representation that Treadwell had inspected the truck and found nothing wrong. The jury could have inferred from the obviousness of the damage to the firewall that Treadwell's salesman made an intentional misrepresentation in making this statement. On the basis of this evidence, the jury could have concluded either that Treadwell had not properly inspected the truck but told him it had, or that Treadwell had inspected and found the firewall damage, but failed to inform Campbell of the damage. Thus the evidence supports a finding of intentional misrepresentation sufficient to support an award of punitive damages.

Treadwell also argues that Campbell failed to prove that he relied on the alleged misrepresentation, because he had already decided to buy the truck before the statement was made. Campbell's request for a further inspection of the truck logically makes any acceptance at the time conditional, depending upon a favorable report after the inspection. Thus, there was evidence that the final decision to purchase came after the statement that the truck was

"OK." Moreover, Treadwell, in connection with offering the Extended Service Policy, made a representation that Treadwell had thoroughly inspected the truck and found nothing wrong. As discussed above, the jury could have found from the evidence that this representation was false. The jury could also have found that Campbell relied upon this misrepresentation in purchasing the truck. Thus, the record supports a finding of reliance by Campbell.

Finally, Treadwell argues that the evidence does not support a finding of fraud because Campbell was not pressured into accepting the truck, but rather was told that he could take the truck to a mechanic of his choosing for an inspection. Treadwell cites by analogy *Hopper v. Curry,* 408 So. 2d 83 (Ala. 1981). In *Hopper* the seller of land told the purchasers that he thought the parcel was 40 acres, but that they could have it surveyed to find out. When it later turned out to be only 30 acres, they sued for fraud. This Court affirmed the judgment in favor of the seller because the purchasers failed to accept the seller's offer to have the property surveyed.

Treadwell, however, actively represented that it had thoroughly inspected the truck and found it to be in good working condition—such good condition that it was willing to offer Campbell its one-year service contract by which Ford would pay for repairs. Treadwell, by inspecting the truck, had more basis for knowledge as to the representation ~~than the~~ seller in *Hopper,* who did not say he had had the property surveyed. Furthermore, when Campbell asked Stevens to further inspect the truck, Stevens agreed to do so and told Campbell later that Treadwell's mechanic had inspected the truck and that it was "OK," Thus, this case is different from *Hopper* in two respects. Treadwell made a more definite statement than the seller in *Hopper* did. Treadwell, unlike the seller in *Hopper*, also agreed to perform an inspection and then, the jury could have found, misrepresented the results of the inspection.

Stevens testified that Treadwell normally charged customers for the Extended Service Policy, but that Campbell received the policy at no additional charge. Campbell was justified in relying on Treadwell's statements about the condition of the truck.

Treadwell raises other issues which we have reviewed and determined not to present reversible error.

ISSUES RAISED BY DAIRYLAND

Violation of Motor Vehicle title Law

Dairyland's first issue raises the question of liability based on Dairyland's violation of the Alabama Uniform Certificate of Title and Antitheft Act, Code 1975, § 32-8-87(b), *supra,* by failing to obtain the V.I.N. and license plates from the truck and send them, together with the certificate of title, to the Department of Revenue. This violation is a misdemeanor. § 32-8-13. The Legislature substantially amended § 32-8-87 after the time of this accident. Act No. 85-650, 1985 Ala. Acts 1010. We express no judgment whether these changes would affect the kind of liability sought to be imposed upon Dairyland if the case had been based on failure to comply with the Act after the effective date of this amendment.

The complaints in the Hamilton and evans cases included counts alleging that Dairyland's violation of this Code section constituted negligence which proximately caused the plaintiffs' injuries. Treadwell alleged in its cross-claims and third-party claim that Dairyland's failure to comply with the Act constituted negligence or a misrepresentation of the condition of the truck. We do not address the question of whether the cross-claims and the third-party claim are viable or are prohibited attempts at compensation among joint tort-feasors, in view of our resolution of the issues on the merits of the plaintiffs' claims in favor of Dairyland.

The trial court instructed the jury that Dairyland's violation of this Act was negligence as a matter of law, that

the plaintiffs were within the class of persons intended to be protected by the Act, and that the jury was to decide whether Dairyland's violation of the Act was the proximate cause of the accident. Dairyland objected to these instructions.

Before the violation of a statute can be taken as evidence of negligence as a matter of law in a civil action, the plaintiff must show that the statute was designed to protect the class of persons of which the plaintiff is a member and to prevent the type of injury which the plaintiff has suffered, that the defendant violated the statute, and that the violation proximately caused the injury. *Fox v. Bartholf*, 374 So. 2d 294 (Ala. 1979); *Johnson v. I.B.E.W. Local 558 Properties, Inc.*, 418 So. 2d 885 (Ala. 1982); *Murray v. Alabama Power Co.*, 413 So. 2d 1109 (Ala. 1982).

The Act was not enacted to prevent motor vehicle accidents, but to prevent motor vehicle thefts. The very title states that it is an antitheft act. The overall plan of the Act shows exclusive attention to maintaining records of the identity and ownership of vehicles.

Hamilton's executors, Evans, and Treadwell advance the argument that, because the Act calls for an inspection of a "total loss" vehicle before the issuance of "rebuilt" identification plates, §§ 32-8-48, -35, the Act provides for a safety inspection to protect subsequent purchasers from dangerous, defectively rebuilt vehicles. The inspection is made by the Department of Revenue, however, not the Department of Safety (a point confused by the trial court in its instructions). A reading of § 32-8-35 shows that the inspection is for the purpose of determining that the vehicle for which new plates are being sought is the one described in the application for a new certificate of title.

Of course, if the Act was not intended to prevent the sort of injury complained of there, it cannot have been enacted to protect accident victims. It was enacted to pro-

tect owners of vehicles from thefts. See *State v. Spurlock*, 393 So. 2d 1052 (Ala. Crim. App. 1981).

For the foregoing reasons, violation of the Act did not subject Dairyland to liability for misrepresentation as alleged in Treadwell's claims against Dairyland, because that theory was not submitted to the jury in the court's instructions and has not been argued here.

AEMLD

Dairyland is entitled to a reversal on the AEMLD because that doctrine does not impose liability on Dairyland under the facts of this case. The principles of liability under the AEMLD are stated in *Casrell, supra*, as follows:

> "To establish liability, a plaintiff must show:
>
> "(1) he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if
>
> "(a) the seller is engaged in the business of selling such a product, and
>
> "(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."

335 So. 2d at 132-33. The decision in *Atkins* added a discussion on the affirmative defense of lack of causal relation:

> "*Causal Relation.* The defendant may establish that there is no causal relation in fact between his activities in connection with handling the product and its defective condition. For example, the defendant may show that he is in the business of either distributing or processing for distribution finished products; he received a product already in a defective condition; he did not

> contribute to this defective condition; he had neither knowledge of the defective condition, nor an opportunity to inspect the product which was superior to the knowledge or opportunity of the consumer."

335 So. 2d at 143 (footnote omitted).

Clearly, the AEMLD does not apply to the seller of a used, wrecked vehicle for salvage. Dairyland had nothing to do with the repair work, nor did Dairyland sell or attempt to sell other than to a junkyard for salvage. This is too far afield of the sellers in the chain of marketing a new product to be reached by the Alabama Extended Manufacturers' Liability Doctrine.

For the foregoing reasons, the judgments on the verdicts against Treadwell are affirmed, and the judgments on the verdicts against Dairyland, including those on the cross-claims, are reversed, and the cause remanded.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

All the Justices concur.[2]

ON APPLICATION FOR REHEARING

PER CURIAM.

OPINION CORRECTED; APPLICATION OVERULED.

All the Justices concur.

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[2] Justice Houston, not being on the Court at the time of submission, has listened to the tape of oral arguments and studied the record and briefs.

APPENDIX C

PENALTY ORDER

January 10, 1986

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

83-574

TREADWELL FORD, INC.

v.

MOBILE CIRCUIT COURT

#CV 81-2968; 81-2653; 81-2654

CLARENCE W. CAMPBELL; DAIRYLAND INSURANCE CO.; KATHERINE CHAPMAN HAMILTON AND FREDERICK B. HAMILTON, AS CO-EXECUTORS OF ESTATE OF SALLIE CHAPMAN HAMILTON, DECEASED; JACQUELINE EVANS

This cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the appellant, Treadwell Ford, Inc., and Fidelity & Deposit Company of Maryland, surety on the supersedeas bond, pay the amount of the judgment of the circuit court against it plus ten percent damages and interest and the costs of appeal as provided by the Alabama Rules of Appellate Procedure, for which let execution issue.

OPINION BY ALMON, J.

ALL THE JUSTICES CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do

hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) or record in said Court.

Witness my hand this 7 day of Apr 1986

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

DAIRYLAND INSURANCE COMPANY
Appellant,
vs. CASE NO. 83-583
KATHERINE CHAPMAN HAMILTON and FREDERICK B. HAMILTON, etc., et al,
Appellees.

* * * * * * * * * *

TREADWELL FORD, INC.,
Appellant,
vs. CASE NO. 83-574
CLARENCE W. CAMPBELL, et al,
Appellees.

Appealed Form The Judicial Court For The Thirteenth Judicial Circuit (Mobile County, Alabama)

COMBINED BRIEF OF TREADWELL FORD, INC. (APPELLANT AND APPELLEE) IN SUPPORT OF ITS APPLICATION FOR REHEARING

ORAL ARGUMENT REQUESTED

ATTORNEYS FOR TREADWELL FORD, INC.

JAMES H. CROSBY

PHILIP H. PARTRIDGE
E. J. SAAD
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IX

THE INSTANT DECISION IS INCORRECT IN THAT THE ONE MILLION DOLLAR ($1,000,000.00) PUNITIVE DAMAGE AWARD IN THE HAMILTON CASE VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS MADE APPLICABLE TO THE STATES BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States makes binding on the States the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States. It is clear under the law of this Court that punitive damages imposed pursuant to §6-5-410, *Code of Alabama* (1975), are imposed for the sole purpose of punishment and deterrence. *See, e.g., State Docks Commission v. Barnes,* 225 Ala. 403, 143 So. 581 (1932). Thus, the punishment inflicted pursuant to §6-5-410 expresses the classic purposes of the criminal law. *See., e.g., Trop v. Dulles,* 356 U.S. 86, 96 (1958).

Because the $1,000,000.00 punitive damage award in this case is no different from a criminal fine for purposes of Eighth Amendment analysis, the size of this punitive

damage award is controlled by the Excessive Fines Clause of the Eighth Amendment.

In Appellant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial, as well as in its Briefs on appeal to this Court, Treadwell argued that the punitive damage award in these cases were excessive. The statutory provision involved here, §6-5-410, sets no limit on the amount of punitive damages which may be awarded in an action brought pursuant to its provisions. In this case, the only culpable conduct claimed was that Treadwell failed to discover a defect in a used car which it had taken a trade and thereafter sold the vehicle in this defective condition to a buyer who himself testified that when he test drove the truck, he experienced a problem with the truck jumping forward when put in in gear.

In Alabama, if Treadwell had been indicted and convicted for business fraud for the same conduct pursuant to §§13A-4-3, 13A-5-12, and 13A-9-41, *et seq., Code of Alabama* (1975), Treadwell could have anticipated a monetary penalty of no more than $3,000.00. This specific judgment by the Alabama legislature with respect to the maximum size of monetary punishment appropriate to be inflicted in cases of out-and-out business fraud is the best measure of the gross disproportionality between the harm done by Treadwell in this case—assuming, *arguendo,* that Treadwell did any legally cognizable harm—and the severe punishment inflicted upon Treadwell for that alleged conduct. Unless and until the Alabama legislature acts to determine appropriate levels of punishment available under §6-5-410, the Excessive Fines Clause of the Eighth Amendment prohibits the administeration of punishment visited upon persons convicted of criminal offenses under the Alabama Business Frauds statute.

X

THE INSTANT DECISION IS INCORRECT IN THAT THE ONE MILLION DOLLAR ($1,000,000.00) PUNITIVE DAMAGE AWARD IN THE HAMILTON CASE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

To punish the kind of business conduct engaged by Treadwell in this case with a fine of $1,000,000.00 in the form of punitive damages is irrational in light of the overall circumstances and therefore in violation of the Due Process Clause of the Fourteenth Amendment. Indeed, this $1,000,000.00 award constitutes nothing but an enormous monetary windfall bearing no relationship to economic loss suffered by the estate of Ms. Hamilton. This punishment was administered under no discernible standards whatsoever, leaving appellant with no way of adjusting its conduct in advance so as to avoid its imposition.

XI

THE INSTANT DECISION IS INCORRECT IN THAT THE VERDICT OF THREE HUNDRED FIFTY THOUSAND ($350,000.00) IN PUNITIVE DAMAGES AWARDED IN THE CLAUSE OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS MADE APPLICABLE TO THE STATES BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

For essentially the same reasons discussed in Argument VI above regarding the award of punitive damages in the *Hamilton* case, the $350,000.00 punitive damage award in the *Campbell* case is grossly excessive and therefore in violation of the Excessive Fines Clause. As argued above, under the Excessive Fines Clause a punitive damage award

must bear some reasonable relationship to the amount of jewelry caused directly by the acts of the person upon whom that punishment is visited as evaluated by punishment prescribed for similar acts under the statutes of Alabama. Although Campbell may have experienced trauma in connection with the incident involving this vehicle, the $350,000.00 punitive damage award is unrelated to that trauma and constitutes nothing more than a windfall to him. As such, it is totally unrelated to any actual injury received by Campbell and is grossly out of proportion with to any damage he may have sustained. More importantly, even assuming, *arguendo,* hat Treadwell practiced business fraud in its dealings with Mr. Campbell, its punishment would have been no more than $3,000.000. This punitive damage award must be reduced accordingly.

XII

THE INSTANT DECISION IS INCORRECT IN THAT THE THREE HUNDRED FIFTY THOUSAND DOLLAR ($350,000.00) PUNITIVE DAMAGE AWARD IN THE CAMPBELL CASE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The $350,000.00 punitive damage award in the *Campbell* Case was imposed under no discernable statutory standards by which Treadwell could know that such a fine would be imposed under the facts and circumstances of this case. Thus, this punitive damage award constitutes nothing more than an extraordinary monetary windfall to Campbell while advancing no discernable state in interest at all.

XIII

THE INSTANT DECISION IS INCORRECT IN THAT SECTION 12-22-72, *CODE OF ALABAMA* (1975) IS FACIALLY UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The mandatory, nondiscretionary ten percent penalty imposed on Treadwell as a result of this Court's affirmance of these money judgments against Treadwell in these cases violates Treadwell's right, under the Equal Protection Clause of the Fourteenth Amendment, to equal access to the appellate courts of Alabama. This result is dictated by the decision of the Supreme Court of the United States in the case of *Lindsey v. Normet,* 405 U.S. 56 (1972).

* * * *

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Brief and Argument on each counsel for record for all parties in these cases and the Attorney General of the State of Alabama by mailing same by United States mail, properly addressed, and first class postage prepaid.

DATED this 7th day of February, 1986.

BY: /s/ E. J. Saad

E. J. SAAD

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APPENDIX E

[FILED April 30, 1986
Clerk Supreme Court of Alabama]

IN THE SUPREME COURT OF ALABAMA

DAIRYLAND INSURANCE COMPANY,
Appellant,
vs. CASE NO. 83-583
KATHERINE CHAPMAN HAMILTON AND FREDERICK B. HAMILTON, etc., et al,
Appellees.

* * * * * * * * * *

TREADWELL FORD, INC.,
Appellant,
vs. CASE NO. 83-574
CLARENCE W. CAMPBELL, et al,
Appellees.

CONSOLIDATED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Treadwell Ford, Inc., an Appellant and Appelle in the above consolidated cases, hereby appeals to the Supreme Court of the United States from:

(a) The final judgment of the Supreme Court of the State of Alabama of January 10, 1986, affirming the judgments against Treadwell Ford, Inc., rendered in the Circuit Court of Mobile County, and reversing judgments in favor of

Treadwell Ford, Inc. also rendered in the Circuit Court of Mobile County which said judgments were entered on October 25, 1983.

(b) The final order issued by the Supreme Court of the State of Alabama overruling the Application for Rehearing which said order was entered on March 7, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

BROWN, HUDGENS, RICHARDSON, P.C.
Attorneys for TREADWELL FORD, INC.

BY: /s/ James H. Crosby
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BY: /s/ E. J. Saad
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 30th day of April, 1986, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing same by United States certified mail, properly addressed, and first class postage prepaid.

BY: /s/ E. J. Saad
E. J. SAAD

APPENDIX F

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

KATHERINE CHAPMAN HAMILTON,

Plaintiff,

VS.

CIVIL ACTION NO: CV-81-002653

TREADWELL FORD, INC., *et al.*,

Defendants.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Defendant, Treadwell Ford, moves this Honorable Court to set aside the verdict and judgment entered into in the above styled action on October 25, 1983, and to enter judgment in favor of the Defendant in accordance with the Motion for Direct Verdict heretofore filed by the Defendant, or in the alternative, Defendant moves this Honorable Court to set aside the verdict and grant Defendant a new trial on the following separate and several grounds, separately and severally, to-wit:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The verdict is contrary to the weight of the evidence.

5. The verdict is contrary to the overwhelming weight of the evidence.

6. The verdict is against the great preponderance of the evidence.

7. Based upon the evidence presented by the Plaintiff, the verdict of the jury indicates that the jury based their award on speculation and conjecture.

8. Based upon the evidence adduced by the Plaintiff in this case, the verdict of the jury indicates that the jury based their award on mistake and inadvertence.

9. There is no evidence to support the verdict of the jury.

10. For that the Curt erred in refusing to give a Directed Verdict in favor of this Defendant, in that the Plaintiff failed to prove a prima facie case against this Defendant.

11. For that the Court erred in refusing to give a Directed Verdict in favor of this Defendant, in that the Plaintiff failed to prove the essential elements of actionable recovery under the Alabama Extended Manufacturers Liability Doctrine.

12. For that the Court erred in refusing to give a Directed Verdict in favor of this Defendant, in that the Plaintiff failed to prove a prima facie case of negligence against this Defendant.

13. For that the Court erred in refusing to give a Directed Verdict in favor of this Defendant and that the Plaintiff failed to prove a prima facie case of wantonness against this Defendant.

14. For that the Court erred in refusing to give a Directed Verdict in favor of this Defendant, and that the Plaintiff failed to prove a scintilla of evidence under Alabama law to support recovery for damages.

15. The Court erred in refusing Defendants' Motion for Directed Verdict at the close of the Plaintiff's evidence.

16. The Court erred in refusing the Defendants' Motion for Directed Verdict at the conclusion of all of the evidence.

17. The Plaintiff failed to introduce any evidence from which the jury reasonably could conclude that the Defendants breached any duty which it owed to the Plaintiff's intestate.

18. The evidence clearly preponderates in favor of the conclusion that the Defendants breached no duty to the Plaintiff's intestate.

19. There was not a scintilla of evidence to support an award of punitive damages.

20. There was not a scintilla of evidence to support an award of damages.

21. The verdict of the jury was excessive.

22. The verdict of the jury fails to do justice between the parties.

23. The verdicts are inconsistent.

24. The Court committed error in allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to the witness, L. R. Boyette.

25. The Court committed error allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to the witness, Gary Nicholson.

26. The Court committed error in allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to the witness, John Ewing.

27. The Court committed error in allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to the witness, Larry Tate.

28. The Court committed error in allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to the witness, Dorothy Matthews.

29. The Court committed error in allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to the witness, Sadie Shute.

30. The Court committed error in allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to the witness, Officer J. A. McLaughlin.

31. The Court committed error in allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to the witness, George Green.

32. The Court committed error in allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to the witness, Bill Wunchel.

33. The Court committed error in allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to the witness, Don Scott.

34. The Court committed error in allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to the witness, Jacquelyn Evans.

35. The Court committed error in allowing into evidence, over the objection of the Defendants, answers to certain questions propounded to witness, Clarence Campbell.

36. The Court committed error in substaining the Plaintiff's objections to evidence offered by the Defendants by the witness, Donna Englund.

37. The Court committed error in substaining the Plaintiff's objections to evidence offered by the Defendants by the witness, Rudolph Phillips.

38. The Court committed error in substaining the Plaintiff's objections to evidence offered by the Defendants by the witness, Jim Harris.

39. The Court committed error in substaining the Plaintiff's objections to evidence offered by the Defendants by the witness, Henry Douglas.

40. The Court committed error in substaining the Plaintiff's objections to evidence offered by the Defendants by the witness, Steve Stevens.

41. The Court committed error in substaining the Plaintiff's objections to evidence offered by the Defendants by the witness, Bill Brooks.

42. The Court committed error in substaining the Plaintiff's objections to evidence offered by the Defendants by the witness, Joe Treadwell.

43. The Court committed error in substaining the Plaintiff's objections to evidence offered by the Defendants by the witness, Fred Lewter.

44. The Court committed error in substaining the Plaintiff's objections to evidence offered by the Defendants by the witness, Ronald Bolton.

45. The Court committed committed error in overruling the Defendants' objections to certain evidence offered by the Plaintiff.

46. The Court committed error in sustaining the Plaintiff's objections to certain evidence offered by the Defendants.

47. The Court committed error in failing to charge the jury as to the proper standard of care owed by vendors of used vehicles.

48. The Court committed error in giving a misleading charge or charges with regard to the standard of care owed by vendors of used vehicles.

49. The Court committed error in allowing the expert testimony of Kendall Clark.

50. The Court committed error in overruling Defendants' objection to the testimony of Kendall Clark.

51. The Court committed error in refusing to allow the Defendant to put on testimony from Fred Lewter in response to the testimony of Kendall Clark.

BROWN, HUDGENS, RICHARDSON, WHITFIELD & GILLION, P.C.
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By: /s/ Philip H. Partridge
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 23rd day of November, 1983, served a copy of the foregoing on counsel for all parties to this proceeding, by mailing copy of the same by United States mail, properly addressed, and first class postage prepaid.

By: /s/ Philip H. Partridge

APPENDIX G

IN THE SUPREME COURT OF ALABAMA

DAIRYLAND INSURANCE COMPANY,
Appellant,
vs.
KATHERINE CHAPMAN HAMILTON
and FREDERICK B. HAMILTON, CASE NO: 83-583
Appellees,

* * * * * * * * *

TREADWELL FORD, INC.
Appellant,
vs. CASE NO: 83-574
CLARENCE W. CAMPBELL,
et al.,
Appellees.

Appealed From The Circuit Court For The Thirteenth Judicial Circuit (Mobile County, Alabama)

BRIEF OF APPELLANT
TREADWELL FORD, INC.

ORAL ARGUMENT REQUESTED

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• • • • •

VI

THE DAMAGES AS AWARDED BY THE JURY WERE EXCESSIVE UNDER THE FACTS ADDUCED AT TRIAL.

In its Motion for Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial, Treadwell asserted that the amount of the damages awarded in the verdicts were excessive. This Motion was denied.

Treadwell is, of course, aware of this Court's reluctance to set aside jury verdicts and of the attendant presumption of correctness that is afforded when a motion for new trial on the ground of excessiveness is overruled. Nevertheless, this Court has consistently stated that it will exercise this power when it "can clearly see that the verdict has been reached on account of bias, passion, prejudice, corruption, or other improper motive or cause." *Vest v. Gay*, 275 Ala. 286, 154 So.2d 297 (1963). *See, Hickox v. Vester Morgan, Inc.*, Ala., 439 So.2d 95 (1983).

While no inflexible rule exists to determine whether bias, prejudice or other improper motive has induced the particular jury verdict, this Court has said that the internal evidence, and the verdict itself, in the light of the facts, usually furnish the controlling data. *Central of Georgia Ry Co. v. Steed*, 287 Ala. 64, 248 So.2d 110 (1971).

In *Continental Volkswagon, Inc. v. Soutullo*, 54 Ala. App. 410, 309 So.2d 119 (1975), the jury awarded the plaintiff punitive damages due to certain alleged misrepresentations made in the sale of a used vehicle. The appellant's motion for a new trial was denied, and the Court of Civil Appeals reversed, finding the award was excessive and that there was no evidence to support the award of punitive damages. Basically, the evidence there showed that the purchaser had not been pressured into buying the automobile, and while certain misrepresentations may have been made as

to the condition of the vehicle, the *Soutullo* Court concluded there was no evidence to show that the fraud was gross, oppressive, and committed with an intent to injure, so as to allow the awarding of punitive damages. Therefore, reversal at the appellate level was granted.

Treadwell contends that the same is true in the case at bar. No pressure was placed on Campbell to purchase the truck, and indeed, Treadwell offered him every opportunity to have the truck inspected by a mechanic of his own choosing. The most Treadwell stands accused of is telling the Plaintiff the truck was "Okay" and failing to discover the truck had been wrecked and repaired before it came into Treadwell's possession.

As to the defect which allegedly caused Campbell to strike Jacqueline Evans and Sallie Hamilton, the evidence clearly shows that it was unknown to Treadwell. Indeed, the latent defect, a bent firewall which supposedly caused the accelerator linkage to stick, was not even discovered by the City of Mobile immediately after the accident. The uncontradicted evidence was that the City tested the vehicle after seizing it and, despite exhaustive tests, could not force the accelerator to stick as Campbell claims it did. The alleged sticking linkage was only "discovered" when the Plaintiffs' hired expert actually *dismantled the accelerator linkage and studied it in his laboratory.* If even the Plaintiffs' expert could not discover the defect without laboratory tests, how can Treadwell be held responsible for not knowing of its existence?

In the instant cases, the jury returned a verdict of Sixty Thousand and No/100 ($60,000.00) Dollars for Plaintiff Evans, Three Hundred Fifty Thousand and No/100 ($350,000.00) Dollars for Plaintiff Campbell and One Million and No/100 ($1,000,000.00) Dollars for Plaintiff Hamilton. Treadwell submits that these verdicts are patently excessive and that the Trial Court erred in failing to reduce the verdicts or grant a new trial. Without question,

the Wrongful Death Statute provides for the imposition of punitive damages. However, Treadwell submits that, where the only culpable conduct claimed against Treadwell was that they failed to discover a latent defect and sold the vehicle in its allegedly defective condition, then the sheer size of this judgment is completely out of proportion to any conceivable wrong done by this Defendant.

This is especially true when the Hamilton verdict is viewed in light of the Evans and Campbell Cases. In Evans, the Plaintiff did not even file a claim that Treadwell acted wantonly. Nor did Evans in any way seek punitive damages against Treadwell for its conduct. In the Campbell Case, although the Plaintiff did file two claims against Treadwell for wanton misconduct, the Trial Court granted a directed verdict as to those counts and no appeal was taken by the Plaintiff.

Under these circumstances, it is readily apparent that there was no factual basis to support three (3) verdicts of the size rendered by this jury. The obvious and compelling explanation for the verdicts is that they resulted from the poisoned atmosphere created by the manner in which the trial was conducted and the prejudice deliberately instilled in the jury's minds by Campbell's counsel. As such, Treadwell suggests that this Honorable Court should properly exercise its power to grant a new trial based on the excessiveness of the verdicts or to remit the verdicts to a proper level.

This is not a case where a used car dealer knowingly and deceitfully sold the Plaintiff a wrecked and rebuilt automobile, and then deliberately mis-stated the truth in an effort to cover up its knowledge of the damage and the condition of the vehicle. Instead, this is a case where Treadwell was the innocent victim of a series of circumstances first set in motion by Dairyland Insurance Company when it failed to meet a responsibility both mandated by law and its own self-acknowledged internal practices.

With this in mind, Treadwell asks this Court to reverse the ruling of the Trial Court in denying the Motion for a New Trial, ordering that a new trial be granted in all three cases or that Your Honors remit the verdicts to reasonable levels.

* * * * *

APPENDIX H

Jury Instructions Related to Damages*

[R-514]

Now, ladies and gentlemen, the question of legal fraud or false misrepresentation which I told you a minute ago is one of the counts in the complaint of the plaintiff Campbell only. It is not one of the charges of the other plaintiffs in this case, but only in the Campbell case. He is claiming damages from the defendant for an alleged legal fraud practiced upon him by the defendant. Fraud charged in the plaintiffs complaint has to do with the sale, the representations made with respect to the sale of the vehicle.

It is alleged in the complaint that at or about the time the plaintiff purchased the truck from the defendant as aforesaid the defendant—talking about Treadwell Ford—represented to the plaintiff that the said truck was then and there in good working condition.

Representations—it is further alleged by the defendant, were false. And the defendant knew they were false. Or the representations made by the defendants were false and the defendants, without knowledge of the true facts, recklessly misrepresented them or representations made by the defendants were false and made by the defendants by mistake but with [R-515] the intention that the plaintiff should rely upon them.

Now, that gives the several definitions of legal fraud. With respect to a willful misrepresentation, I charge you that if you are reasonably satisfied from the evidence in this case that the defendant willfully misrepresented a material fact to the plaintiff on the occasion of the sale of the truck by Treadwell to the plaintiff Campbell—Willfully misrepresented a material fact to the plaintiff with the

* These instructions are reprinted verbatim from the record in this case.

intent to induce the plaintiff to act thereon and the plaintiff did without knowledge of the falsity act upon the said misrepresentation to his injury, then defendant is guilty of legal fraud. There must be a false representation concerning an existing fact made with knowledge or belief on the part of the defendant that they were false and made by the defendant with intent to induce the plaintiff to act and there must be a reliance by the plaintiff and here again it must proximately cause the injuries to the plaintiff. I am speaking only of Mr. Campbell in this particular case.

Reckless misrepresentation is also charged. If you are reasonably satisfied from the evidence that the defendant misrepresented a material fact requisite and without knowledge of the truth or falsity and with the intent to induce the plaintiff to act and the plaintiff acted upon said reckless misrepresentation to his injury and the defendant would be guilty of a legal fraud there.

Now, there again the elements of reckless misrepresentation concerning an existing material fact made by the defendant reckless without sufficient information with the intent to induce the plaintiff to ace and that the plaintiff relied upon and there again it must have proximately caused the injury.

With respect to a mistaken misrepresentation: To be [R-516] reasonably satisfied from the evidence that the defendant innocently or by mistake misrepresented a material fact to the plaintiff thereby inducing action by the plaintiff to his injury. Then the defendant would be guilty of a legal fraud. The elements are similar. Where the mistake was innocent or it was a mistaken misrepresentation but it was made concerning an existing fact with the intent to induce the plaintiff to act and that the plaintiff indeed relied upon it and proximately caused injury.

If you are reasonably satisfied from the evidence that the defendant concealed or withheld material facts from the plaintiff and without his knowledge of such material

facts, he acted to his injury, then the defendant would be guilty of legal fraud.

There were elements of that and the duty to disclose certain facts. A concealment or nondisclosure of material facts to induce the plaintiff to act and that the plaintiff acted to his injuries.

I charge you, laides and gentlemen of the jury, I should do it I presume under the question of damages. Well, I will take those up right now, but I will touch on the last one first, the misrepresentation fraud, which is in the Campbell Complaint. That you could consider what we call punitive damages, if the fraud or false representation, rather, was maliciously made, it was oppressively made - [R-517] or grossly made and made with a knowledge of the falseness or so recklessly made as to amount to the same thing, punitive damages could be considered. In the case of a mistaken representation you can not recover punitive damages. You can't recover punitive damages under any of these unless it was done maliciously, oppressively, grossly and with the knowledge of the falseness or so recklessly made as to account for the same thing. I will tell you what punitive damages is right now.

There are two kinds of damages involved in this particular case; compensatory damages and punitive, if you should find for the plaintiffs in the case. And, incidentally, in view of the contributory negligence plea in this case, it would be possible for you to find for all three claims or for the plaintiffs, Hamilton and Evans and not Mr. Campbell. That is an alternative, naturally I am not suggesting. I am trying to give you alternatives. You are the one that is going to decide this case.

So, if the plaintiffs are entitled to recover, you would consider the two types of damages, compensatory. The word compensatory means to compensate fairly and reasonably compensate the plaintiff for the injuries and damages which have been sustained and the extend of the

injuries and damages are something for you to be reasonably satisfied about from the evidence and the burden is on the plaintiffs to prove to your reasonable satisfaction that injuries and damages were sustained and the extent of them.

But it is damages, actual damages awarded where a plaintiff has reasonably satisfied a judge and jury that they sustained injuries or damages. In the case of the false representation counts you find— You are reasonably satisfied they should recover without considering the —for the moment now the question of punitive damages, where there has been a proximate cause shown as well as an act of negligence or the misrepresentation as alleged. Fairly and reasonably compensate a plaintiff. Punitive or exemplary damages—punitive means to punish—allowed to a plaintiff may be awarded at the sound discretion of a jury where a plaintiff reasonably [R-518] satisfies a jury from the evidence that they are entitled to punitive damages.

Now, punitive damages in this case can be available only in the Campbell case under the false representation count. Punitive damages can be—are the only damages which are available to be awarded in the death case, because that's the way the death statute, the law of Alabama, provides. You don't consider compensatory damages there at all, you only consider damages to punish a defendant in such an amount as you may determine from the evidence in the case to deter other people by way of punishment to the person and for the added purpose of protecting the public, of course, by deterring others from acting in the same manner.

You must take into consideration, when considering punitive damages, the character of the wrong and the degree of the wrong as shown by the evidence in the case.

Now, I have already told you in the false representation in the the Hamilton case that if it is gross, oppressive and so forth, I used two or three words, I forget what the

other one is, malicious, gross, oppressive. If you find that the representations were made as I have defined them to you, and were made under those circumstances you could consider also awarding punitive damages there.

In the other cases, the only damages are claimed in the Campbell case. It is claimed that the plaintiff, Mr. Campbell, was caused to suffer injuries and damages and made physically ill. He continues to suffer and will in the future suffer physical illness. He sufferred, continues to suffer and will in the future suffer extreme mental and emotional anguish and distress. He was caused to doctors and other medical bills in and about the treatment of [R-519] his aforesaid illness, mental and emotional distress and will continue to incur such in the future. He also claims that the aforesaid truck was in a defective condition and unreasonably dangerous for its intended use and purpose when sold by the defendant, Treadwell, to him and that the said was in substantially the same condition at the time of the collision, as at the time it was sold and that it had decreased in value from the—it wasn't worth what he paid for it is about the size of his allegation. Is that right, Mr. Hanley?

MR. HANLEY: Yes, sir.

Was there any evidence of the value before and after to that truck? I ask all of you that question.

MR. PARTRIDGE: Not that I recall.

MR. HANLEY: Not before.

All right. I will not charge them as to that.

In the Hamilton case it is simply alleged that Miss Hamilton was killed, no other allegations. But I have told you that if you find for the plaintiff, the only damages, not compensatory but punitive. Of course, in the awarding of punitive damages, you— Well, I better stay off of that.

In the other case— I say stay off of it because it can apply in some instances to different types of cases of negligence—involving negligence and things of that nature. I suddenly decided that I should not clutter up your mind by giving you an hour lecture on the law involved in this particular case. I know I am throwing it to your pretty fast. I doubt that any of you have had any legal training or spent the years that all of us here have in it. And I am just hoping that I am making it sufficiently usable for [R-520] you.

The damages claimed by Ms. Evans are that she was made sick, sore, and lame. She was injured. She was permanently injured. She was caused to lose time from her employment, her ability to work and earn money in the future has been irrevocably impaired. She has been caused to incur doctor bills, hospital bills, and other medical expenses in and about the care and treatment of her injuries. She was caused to suffer severe physical pain and mental anguish and still so suffers and will so suffer in the future.

Remember I told you in the finding of compensatory damages that if you do award damages, compensatory damages, in these cases, you should award an amount that would fairly and reasonably compensate the plaintiff for the injuries and damages suffered. We have to leave that up to you. I can't give you any mathemathical formula or anything like that by which you can make those determinations. Certainly with respect to damages, or rather, injuries to be suffered in the future, that's something you are just going to have to look at the evidence and make your own decision taking into consideration the various rules that I have given you here. With respect to pain and suffering, that's another one you are going to have to rely on your judgment in determining, such things as doctor bills, hospital bills, or things of that nature which are expressed in dollars and cents terms are a little bit easier to determine from the compensatory viewpoint of com-

pensating a person for their injuries, damages to which they have been put.

* * * *

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No. 85-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TREADWELL FORD, INC.,
Appellant,

v.

CLARENCE W. CAMPBELL, *et al.*,
Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

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QUESTION PRESENTED

Whether federal claims which were not presented to the Supreme Court of Alabama until an application for rehearing, which were not presented in accordance with established state practice, and which were not passed upon by that court, are within this Court's jurisdiction.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1799

TREADWELL FORD, INC.,
Appellant,

v.

CLARENCE W. CAMPBELL, *et al.*,
Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

Pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, appellees move to dismiss this appeal on the grounds that the federal questions sought to be reviewed were not timely and properly raised before the Supreme Court of Alabama and were not passed upon by that court.

STATEMENT OF THE CASE

On January 10, 1986, the Supreme Court of Alabama affirmed judgments entered in the Circuit Court of Mobile County, Alabama against the appellant Treadwell Ford, Inc. (hereinafter sometimes referred to as "Treadwell"), in favor of the appellees. The trial court had awarded Clarence W. Campbell $350,000 upon his claim for compensatory and punitive damages; Jacqueline Evans $60,000 compensatory damages; and the executors of

Sallie C. Hamilton $1,000,000 as punitive damages in a wrongful death action.

The federal constitutional challenges sought to be raised in this Court were not presented to the trial court, nor were they presented to the Supreme Court of Alabama until the appellant filed its application for rehearing in that court.

Without citing any constitutional law cases in support of its argument, Treadwell for the first time upon rehearing maintained that the punitive damages awards were violative of the Excessive Fines Clause of the Eighth Amendment and also of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. (Jurisdictional Statement 26a-29a). Prior to that time, the appellant had asserted, upon a post-judgment motion in the trial court that, "[t]he verdict of the jury was excessive" (Jurisdictional Statement 36a), and had argued that ground generally in its initial brief on appeal without alluding to any constitutional grounds. (Jurisdictional Statement 42a-45a).

Also for the first time on application for rehearing, the appellant asserted that § 12-22-72, Code of Alabama (1975), violated the Equal Protection Clause of the Fourteenth Amendment. That code section provides for a ten percent (10%) penalty to be assessed against a defendant who suffers an affirmance on appeal of a money judgment against him.

Without addressing either of these federal constitutional claims, the Alabama Supreme Court overruled the appellant Treadwell's application for rehearing on March 7, 1986.

ARGUMENT

I. THE FEDERAL ISSUES WERE NEITHER PROPERLY PRESENTED TO NOR CONSIDERED BY THE SUPREME COURT OF ALABAMA.

This Court has laid down the general rule that "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration" here. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, § 4022 at 701 (1977).

The Alabama appellate courts are firmly committed to the rule that new questions may not be presented to them for the first time on rehearing. In *Kirkland v. Kirkland*, 281 Ala. 42, 198 So.2d 771, 777 (1967), the Supreme Court of Alabama held:

> "We cannot sanction the practice of bringing up new questions for the first time in application for rehearing. Robinson v. Allison, 97 Ala. 596, 604, 12 So. 382, 604 [sic].
>
> "An application for rehearing on ground not argued or suggested until after our judgment was rendered cannot now be considered."

In *Lovett v. Uptain*, 450 So.2d 113, 116 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116, 118 (Ala. 1984), the court stated:

> "After an opinion has been rendered by an appellate court, consideration may not be given on rehearing to issues which were not argued nor suggested upon the initial submission of the case."

See Green v. First National Bank of Tuscaloosa, 49 Ala. App. 426, 272 So.2d 895, 901 (1971), *rev'd on other grounds*, 290 Ala. 14, 272 So.2d 901 (1972); *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Anderson*, 48 Ala. App. 172, 263 So.2d 149 (1972), *cert. de-*

nied, 288 Ala. 538, 263 So.2d 155 (1972); *Putnam v. City of Huntsville*, 48 Ala. App. 33, 261 So.2d 754 (1972). This rule is but an extension of the general Alabama rule against raising new issues for the first time on appeal. In *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983), this Court noted that "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." [1]

The Supreme Court of Alabama has specifically refused to hear arguments upon new *constitutional* issues raised for the first time on rehearing. *See Cooper v. State*, 226 Ala. 288, 147 So. 432 (1933); *State v. City of Birmingham*, 160 Ala. 196, 48 So. 843 (1909).[2]

In construing Section 25 of the Judiciary Act of 1789, the predecessor of 28 U.S.C. § 1257, Justice Story wrote: "it has been uniformly held that to give this court jurisdiction, two things should have occurred and be apparent in the record: First, that some one of the questions stated in the section did arise in the court below; and second, that a decision was actually made thereon by the

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[1] In *Orr v. Orr*, 440 U.S. 268 (1979), a constitutional claim was first presented on appeal, but was considered by the Supreme Court of Alabama without objection. At 440 U.S. 274, this Court noted:

> "This unexcused tardiness might well have constituted a procedural default under state law, and if Alabama had refused to hear [the] constitutional objection on that ground, we might have been without jurisdiction to consider it here."

This Court emphasized that its conclusion did not "preclude any other state, or even Alabama in another case," from concluding that the constitutional argument made in *Orr*, raised in the same manner, would be too late to be considered. *Id.* at 275, n.4.

[2] At page 8 of its jurisdictional statement, the appellant argues that there is some significance to the fact that the Alabama Supreme Court in this case *overruled* its application for rehearing, instead of *denying* the application. Overruling applications for rehearing upon grounds that a constitutional issue was first raised on rehearing is not inconsistent with Alabama's practice. *See e.g.*, Cooper v. State, 226 Ala. 288, 147 So. 432 (1933).

same court . . . ." *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 390 (1836). Where the highest state court does not address a federal question, this Court assumes that the omission was caused by the lack of proper presentation. *Exxon Corp. v. Eagerton*, *supra*, 462 U.S. at 181, n. 3. And even if a state court passes on some questions raised on rehearing, federal questions also then raised but not passed upon may not be presented in this Court. *Fullerton v. Texas*, 196 U.S. 192 (1905).

Citing *Hathorn v. Lovorn*, 457 U.S. 255 (1982), the appellant contends that Alabama's practice of not considering new issues raised for the first time upon application for rehearing is not "strictly or regularly" followed, and hence presents "no independent and adequate state grounds barring [this Court's] review of the federal issue." 457 U.S. at 264-65. The Alabama court's actual practice will be hereinafter explored separately as to the two issues raised in this case.

A. The Constitutionality of § 12-22-72 Was Not Timely and Properly Raised.

Treadwell asserts, at pages 7 and 8 of its Jurisdictional Statement, that the Supreme Court of Alabama, in a line of at least seventeen cases, has dealt with the federal constitutionality of Alabama's affirmance fee statute, or questions regarding the proper construction of that statute, when presented for the first time at the rehearing stage.[3] One of the seventeen cases cited by the

[3] The cases relied upon by the appellant for this proposition are: Brown Mech. Contractors, Inc. v. Centennial Ins. Co., 431 So.2d 932 (Ala. 1983); First Alabama Bank of Montgomery, N.A. v. Martin, 425 So.2d 415 (Ala. 1983); Central of Georgia Railway Co. v. Steed, 287 Ala. 64, 248 So.2d 110 (1971); Chapman v. Rivers Const. Co., 284 Ala. 633, 227 So.2d 403 (1969); City of Troy v. McLendon, 279 Ala. 553, 188 So.2d 281 (1966); Goodyear Tire & Rubber Co. v. Downey, 266 Ala. 344, 96 So.2d 278 (1957); Paterson v. Gaines, 264 Ala. 184, 85 So.2d 893 (1956); Lloyd v. Stewart, 258 Ala. 627, 64 So.2d 884 (1953); Childress v. Younger, 258 Ala. 219, 61 So.2d 808

appellant did not involve a rehearing at all, but involved a second appeal asserting that the original judgment had been misinterpreted on remand, and that case thus is of no assistance in assessing the Alabama court's practice on rehearing. *See Lawrence v. Jones*, 37 Ala. 388 (1861).

In each of the remaining sixteen cases relied upon by the appellant, the parties were arguably uncertain as to whether the affirmed judgments fell within the specific language of § 12-22-72. In eleven of the cases, the successful appellees (plaintiffs below) filed post-affirmance motions or applications asserting that the appellate court should have, but did not, award the 10% affirmance fee. Thus, there are only five cases in which the unsuccessful appellants (defendants below) mounted any challenge, constitutional or otherwise, to the statute. In these cases, the Alabama court held that the 10% affirmance fee had been properly applied when the judgment was affirmed for a specific amount of money and had been superseded by bond on appeal,[4] where a judgment below had been entered under the Federal Employers' Liability Act,[5] or under the Workmen's Compensation Act upon review by certiorari instead of by appeal,[6] and where a municipal

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(1952); City of Birmingham v. Bowen, 254 Ala. 41, 47 So.2d 174 (1950); Atlanta, Birmingham & Coast R. Co. v. Cary, 250 Ala. 675, 35 So.2d 559 (1948); Carter v. Carter, 247 Ala. 409, 24 So.2d 759 (1945); Snellings v. Builders' Supply Co., 229 Ala. 1, 155 So. 858 (1934); Dent v. Foy, 210 Ala. 160, 97 So. 627 (1923); Montgomery Light & Water Power Co. v. Thombs, 204 Ala. 678, 87 So. 205 (1920); New York Life Ins. Co. v. Reese, 201 Ala. 673, 79 So. 245 (1918); Lawrence v. Jones, 37 Ala. 388 (1861).

[4] *See* Snellings v. Builders' Supply Co., 229 Ala. 1, 155 So. 858 (1934).

[5] *See* Central of Georgia Railway Company v. Steed, 287 Ala. 64, 248 So.2d 110 (1971); Atlanta, Birmingham and Coast R. Co. v. Cary, 250 Ala. 675, 35 So.2d 559 (1948).

[6] *See* Goodyear Tire & Rubber Co. of Ala. v. Downey, 266 Ala. 344, 96 So.2d 278 (1957).

defendant had filed a supersedeas bond even though not required to do so.[7]

The instant case differs from those cited by the appellant in one significant respect. Here, the appellant was aware that the judgments secured against it, if left undisturbed upon affirmance, would surely lead to the application of the penalty provided by § 12-22-72. In fact, Treadwell has not heretofore, and apparently does not now, maintain that the affirmance fee statute, if constitutional, should not apply in this case. It thus had ample opportunity to raise its question concerning the statute upon its initial appeal,[8] but presumably elected not to do so.

The appellant's claim that it could present its federal constitutional challenge to § 12-22-72 for the first time on rehearing rests substantially upon the case of *Central of Georgia Railway Company v. Steed*, 287 Ala. 64, 248 So.2d 110 (1971). In that case, the appellant did indeed assert that the forerunner to § 12-22-72 was violative of the Equal Protection Clause of the Fourteenth Amendment. However, nothing in the *Steed* opinion indicates that the Alabama Supreme Court reached that or any other constitutional issue first raised upon rehearing. Rather, the court overruled the application for rehearing upon the authority of *Atlanta, Birmingham & Coast R. Co. v. Cary*, 250 Ala. 675, 35 So.2d 559 (1948), where it had held that the affirmance fee statute applied to judgments in actions in state court brought under the FELA. In *Cary*, the court had simply noted that this Court had held in *Louisville & Nashville R.R. Co. v. Stewart*, 241 U.S. 261 (1916), that it was not improper for a state to add a 10% penalty to a FELA judgment secured in

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[7] *See* City of Birmingham v. Bowen, 254 Ala. 41, 47 So.2d 174 (1950).

[8] *See, e.g.*, Air Movers of America, Inc. v. State National Bank, 293 Ala. 312, 302 So.2d 517 (1974).

state court upon the affirmance of said judgment on appeal.

It is submitted that there is no indication in any of the cited cases that the Supreme Court of Alabama ever addressed a federal constitutional challenge to § 12-22-72 when that issue was raised for the first time upon a post-affirmance motion or application.

The award of the 10% affirmance fee under Alabama's statute is a "ministerial duty" in cases where the trial court's judgment is for money only and is affirmed without alteration or modification. *Childress v. Younger*, 258 Ala. 219, 221, 61 So.2d 808 (1952). The parties, in cases admitting of doubt as to its applicability to their particular judgments, may go through the initial submission stages of an appeal without realizing that there may be disagreement as to whether the affirmance fee statute will be applicable upon affirmance. For this reason, it is logical that the appellate courts in Alabama address those disagreements after such affirmance. When the penalty is added, a surprised appellant may challenge its applicability, and if it is not added, a surprised appellee may insist that the affirmance fee should have been included.

The addressing of this "new issue" upon rehearing in those cases of doubt is thus logical, and may be regarded as an exception to, or as not even being included in, the general rule that the Alabama courts will not address issues raised for the first time upon rehearing. This logic fails, however, where the appellant knows for certain that the judgment is of a class which will definitely be subject to the penalty upon an affirmance.

When a defendant subjected to a large money judgment as in this case elects to take an appeal, he automatically recognizes the certainty of a substantial penalty if the judgment is affirmed. Strategically, he faces the

dilemma of whether to raise a constitutional challenge to the statute upon original submission and thereby exhibit some doubt as to the merits of his appeal, or to exude confidence that the case will be reversed and opt not to challenge the statute at that stage. Under Alabama practice, he is free to choose either route. If, however, he elects not to challenge the statute upon original submission, he faces the Alabama rule that new issues will not be first addressed upon rehearing.

As has been heretofore shown, the case of *Central of Georgia Railway Company v. Steed*, 287 Ala. 64, 248 So.2d 110 (1971), offers no solace to the position of the appellant, because the Alabama Supreme Court did not there address the federal constitutional issue raised on rehearing, although it stated that the appellee made such a claim upon rehearing.

As will be hereinafter shown, the appellant cites only one case (*Dunn v. Dean*, 196 Ala. 486, 71 So. 709 [1916]) where the Alabama Supreme Court directly addressed a constitutional issue clearly not alluded to upon original submission. That issue involved a state constitutional question as to whether the statute under consideration was validly enacted so as to give it life. In view of its long subsequent history of refusing to address any new issues for the first time upon rehearing, it is submitted that the *Dunn* case cannot be construed as a breach in the Alabama Supreme Court's present normal practice of "strictly and regularly" following its exclusionary rule.

B. The Federal Constitutional Challenge to the Excessiveness of the Punitive Damages Award Was Not Timely or Properly Raised.

In its claim that the issue of punitive damages awards was properly raised in the state courts, the appellant asserts at pages 11-12 of the Jurisdictional Statement that the practice of the Alabama Supreme Court is to

consider constitutional issues raised for the first time on rehearing. It there cites four cases for the proposition that, even when the Alabama court suggests that it will not pass upon new questions on rehearing, "it frequently will proceed to pass on such questions." One case relied upon is *Lovett v. Uptain*, 450 So.2d 113 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116 (Ala. 1984), in which the Alabama Court of Civil Appeals refused to consider an issue raised for the first time upon rehearing, observing that "[a]fter an opinion has been rendered by an appellate court, consideration may not be given on rehearing to issues which were not argued nor suggested upon the initial submission of the case." 450 So.2d at 116. On certiorari, the Alabama Supreme Court observed that the party making the new contention had submitted no evidence to support it in the trial court.

In *King v. Reid*, 428 So.2d 611 (Ala. 1983), a constitutional challenge to statutes was raised on appeal which had not been raised in the trial court. The Alabama Supreme Court noted that its prior precedent and a "casual reading" of the statute "disposes of the attack on those statutes," but added that "[*i*]*n any case, the record discloses that these issues were not presented to the court below, and thus review of them is foreclosed here.*" 428 So.2d at 615 (emphasis added). The *King* case did not involve an application for rehearing. In another case relied upon by the appellant, the Alabama Supreme Court refused to consider new matters on rehearing, and emphasized that its holding was *not* to be understood as having decided the new question. *See Kirkland v. Kirkland*, 281 Ala. 42, 198 So.2d 771 (1967).

Ex parte Hanna, 267 Ala. 527, 103 So.2d 720 (1958), also relied upon by the appellant, did not involve an application for rehearing at all. In *Hanna*, at 267 Ala. 529, the court said:

> "Petitioner also contends that Act No. 375 and Act No. 503 are unconstitutional as being violative of the equal protection guaranty of the Fourteenth Amendment to the Constitution of the United States. Respondent contends that the question is improperly raised. Conceding, without deciding, that the question is properly before us, we are convinced that the argument of the appellant is without merit and requires no further discussion."

There is no indication in the *Hanna* case, which was before the Alabama Supreme Court under its original jurisdiction over petitions for writs of mandamus, as to why the federal constitutional issue might have been improperly raised.

At footnote 5 on pages 11-12 of its Jurisdictional Statement, the appellant cites fourteen additional cases which it claims support its contention that the practice of the Alabama Supreme Court is to "entertain and decide federal constitutional questions for the first time in an Application for Rehearing." Only three of those cases involved constitutional questions. Of those three, only *Dunn v. Dean*, 196 Ala. 486, 71 So. 709 (1916), clearly reflects that the court decided a constitutional issue first raised on rehearing, but that constitutional issue involved the unauthorized enactment of a statute which rendered it void under the state constitution. In *Consolidated Coal Co. v. State*, 236 Ala. 489, 183 So. 650 (1938), the court briefly addressed a federal constitutional issue on rehearing, but did not observe that the issue had not been alluded to on initial submission. The court in *Huie v. Smith*, 236 Ala. 516, 519, 183 So. 661 (1938), noted in its original opinion that "[n]o other question was argued at the bar or in brief," and then addressed a federal constitutional question upon rehearing which was not mentioned in the initial opinion. It is unclear, however, whether the federal constitutional issue was alluded to by the parties upon the original submission of *Huie*.

Of the eleven remaining cases cited by Treadwell in footnote 5 of its Jurisdictional Statement, all involving nonconstitutional issues, one application for rehearing was "stricken," even though the justices decided to "express our views" on the issue raised on rehearing. *See Martin Bldg. Co. v. Imperial Laundry Co.*, 220 Ala. 90, 94, 124 So. 82 (1929). In another (*Federal Land Bank of New Orleans v. Williams*, 237 Ala. 318, 321, 186 So. 689 [1939]), the court addressed an issue while expressing doubt as to whether the question involved could be presented on rehearing, stating:

> "[t]his conclusion is reached without a concession that the question may in this manner be first presented on this application. Of this we entertain some doubt, but need express no opinion thereon."

In *Dodson v. Beaird*, 237 Ala. 587, 187 So.2d 862 (1939), and *Louisville & Nashville Ry. Co. v. Western Union Telegraph Co.*, 195 Ala. 124, 71 So. 118 (1916), the court observed that it would not ordinarily consider new issues raised on rehearing, but did so at the expressed or implied request of the parties.

Goodgame v. Dawson, 242 Ala. 499, 7 So.2d 77 (1942), and *Rudolph v. Rudolph*, 251 Ala. 317, 36 So.2d 902 (1948), were cases in which the court stated that it would not consider issues initially raised on rehearing, but observed, that, even had the new arguments been timely made, they were not well taken.

Bienville Mortgage Corporation v. Mayo, 286 Ala. 675, 245 So.2d 819 (1971), does not support the appellant's contention because it is not at all clear from the decision that the issue addressed on rehearing was not urged upon the original submission.

The four remaining cases relied upon by the appellant are cases where the Alabama Supreme Court admittedly addressed new matters for the first time on rehearing. In *Copeland v. Pope*, 198 Ala. 257, 73 So. 490

(1916), the court had reversed a judgment based solely upon an erroneous charge to the jury. On rehearing for the first time, the appellee drew the court's attention to the fact that the appellant had not reserved a proper exception to the erroneous charge, and the appellate court granted rehearing and affirmed.

In *Gibbons v. Gibbons*, 205 Ala. 636, 88 So. 833 (1921), the appellate court had held that the burden of proof had rested with the respondents below. On rehearing, no new issue was raised, but a new theory was suggested as to why the respondents should not have borne the burden of proof. The court rejected the new theory and overruled the application for rehearing.

In *Sisson v. Swift*, 243 Ala. 289, 9 So.2d 891 (1942), the appellate court's initial opinion recited and relied upon the testimony of one who arguably was incompetent to testify regarding a transaction with a deceased person. On rehearing for the first time, the incompetency was suggested. The Alabama Supreme Court overruled the application for rehearing noting that (1) the challenged evidence was not incompetent and (2) that the remaining evidence was sufficient to justify the initial decision.

Howell v. Roueche, 263 Ala. 83, 81 So.2d 297 (1955), was a case in which the appellate court had held that the trial court had erroneously refused to give the affirmative charge to the jury. Upon the original submission, the appellate court recounted the evidence in detail. On rehearing, for the first time, the appellee asserted that a blackboard diagram used at the trial was not included in the appellate record. In overruling the application for rehearing, the Alabama Supreme Court noted that the diagram was not offered as an exhibit, and that the witnesses had adequately described the facts required for the court to reach a decision.

It is arguably clear from a review of the cases cited by the appellant that, except for the highly unusual judi-

cial disqualification issue referred to by this Court in *Aetna Life Insurance Co. v. Lavoie*, (No. 84-1601, April 22, 1986), the Alabama Supreme Court has not addressed a constitutional issue on rehearing which was clearly not alluded to upon original submission since *Dunn v. Dean*, 196 Ala. 486, 71 So. 709 (1916). Even then, it was addressing the basic question of whether a statute was constitutionally adopted so as to give it life under state constitutional principles.

An analysis of the appellant's cases further reveals that, except for decisions involving § 12-22-72 and in the absence of some compelling reason, the Alabama court has directly addressed new nonconstitutional issues on rehearing in only two of such cases and a new theory in a third case since it decided *Copeland v. Pope*, 198 Ala. 257, 73 So. 490 (1916), some 70 years ago. The most recent of those cases was decided 31 years ago (*Howell v. Roueche*, 263 Ala. 83, 81 So.2d 297 [1955]), and that is the only such case decided in the last 44 years since *Sisson v. Swift*, 243 Ala. 289, 9 So.2d 891 (1942). Aside from those decisions, the cases cited by the appellant reveal that the Alabama court has essentially adhered to its position except in instances where it was uncertain as to whether the issue was properly raised or where the new issue was decided by express or implied consent of the parties. In the other instances, the court refused to consider the new issues, but only discussed the merits of such issues in *dicta*. While it may be claimed that these isolated incidents represent chinks in the walls of perfection, it must be said that the Alabama Supreme Court has protected its rule against considering new issues on rehearing with remarkable consistency.

Even if it is assumed that this Court has jurisdiction of this appeal as to the constitutionality of § 12-22-72, it is clear that it does not have jurisdiction to decide the constitutional issues relating to the excessiveness of the punitive damages awards.

In *Illinois v. Gates*, 462 U.S. 213 (1983), and *Dewey v. Des Moines*, 173 U.S. 193 (1899), this Court made it clear that its review is confined to federal questions which had been properly pressed in the state courts.

Although the appellant attempts to bootstrap its Eighth Amendment and Due Process claims by asserting that it generally challenged the punitive damages awards as excessive in its post-trial motion and upon original submission on appeal, it candidly admits that those constitutional issues were "for the first time, expressly relied on" in its brief upon Application for Rehearing. Jurisdictional Statement, 10-11. Treadwell offers no excuse for not raising those federal issues in the trial court and, as this Court observed in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983), "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal."

The appellant likewise offers no excuse for not raising the Eighth Amendment and Due Process questions upon the original submission of the appeal to the Alabama Supreme Court.[9] This Court has recognized that the Alabama Supreme Court will not consider matters which are not specifically raised on appeal. *See CIO v. McAdory*, 325 U.S. 472 (1945).

Finally, even when Treadwell did finally raise the Eighth Amendment and Due Process issues for the first time in brief upon Application for Rehearing, its treatment of those issues was woefully inadequate. As is revealed in the excerpts from its brief in support of its Application for Rehearing reproduced at pages 26a-29a of the Jurisdictional Statement, the appellant did not favor the Alabama Supreme Court with the citation of a

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[9] No claim of "surprise" under the doctrine of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), is suggested.

single authority for the proposition that the awards in this case were unconstitutionally excessive.[10]

Alabama courts have consistently held that they are not required to consider matters in brief for which no supporting authority is cited and which are not sufficiently argued. *See Johnson v. Hodge*, 291 Ala. 142, 279 So.2d 123 (1973); *Bonded Builders & Supply Co. v. Long*, 288 Ala. 669, 264 So.2d 518 (1972); *Morgan v. Cherokee County Bd. of Ed.*, 257 Ala. 201, 58 So.2d 134 (1952); *Mitchell v. State*, 450 So.2d 140 (Ala. Civ. App. 1984); *Blair v. York Engineering Co., Inc.*, 380 So.2d 878 (Ala. Civ. App. 1980); *Security Transactions, Inc. v. Nelson Excavating & Paving Co., Inc.*, 55 Ala. App. 223, 314 So.2d 297, *cert. den.*, 294 Ala. 768, 314 So.2d 304 (1975); *Winn-Dixie Montgomery, Inc. v. Rowell*, 52 Ala. App. 1, 288 So.2d 785, *cert. den.*, 292 Ala. 758, 288 So.2d 792 (1973); *Schwabacher v. Herring*, 35 Ala. App. 496, 48 So.2d 574 (1950).[11]

In its Jurisdictional Statement in this case at pages 16-22, the appellant cites some six cases decided by this Court which it claims, at least by analogy, support its argument that the awards in this case are violative of the Eighth Amendment and the Due Process Clause. Treadwell also refers the Court to arguments in briefs on this issue before this Court in the prior case of *Aetna Life Insurance Co. v. Lavoie* (No. 84-1601, April 22, 1986), which included other citations of authority allegedly supporting the appellant's contentions. Jurisdictional Statement 17. None of these authorities were made available to the Alabama Supreme Court by the appellant in this case.

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[10] With reference to the other question involved in this appeal, Treadwell cited only *Lindsay v. Normet*, 405 U.S. 56 (1972), and alleged in conclusory fashion that the affirmance penalty was violative of the Equal Protection Clause. *See* Jurisdictional Statement, 30a.

[11] As to the office of briefs upon applications for rehearing, *see DeGraff v. State*, 34 Ala. App. 137, 37 So.2d 130 (1948).

The highest appellate courts of the states of this nation are not "dumping grounds" into which litigants can carelessly toss dispositive federal issues and expect state justices to unravel them on their own initiative. If indeed punitive damages presently being awarded in state courts are running afoul of Eighth Amendment and Due Process Clause proscriptions, those complicated issues cannot be addressed upon bald and unsupported assertions that they do so.

Hathorn v. Lovorn, 457 U.S. 255 (1982), and like cases to the contrary notwithstanding, principles of sound judicial economy and of comity, not to mention plain logic, compel a conclusion that this Court should refrain from reviewing federal issues which are belatedly and half-heartedly addressed to the state courts in violation of the established rules of those courts. This Court has fully and completely recognized this principle several times. In *Webb v. Webb*, 451 U.S. 493, 499 (1981), it said:

> "It is appropriate to emphasize again . . . that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.
>
> In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements."

CONCLUSION

This Court stated in *Aetna Life Ins. Co. v. Lavoie*, slip op. at 14 (No. 84-1601, April 22, 1986), that the issues raised on this appeal were important issues "which, in an appropriate setting, must be resolved. . . ." It is submitted that the issues were not appropriately raised in this case so as to create the "appropriate setting" required for their resolution.

For the foregoing reasons, the appeal in this case should be dismissed.

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June 6, 1986

APPENDIX

APPENDIX

§ 12-22-72. AFFIRMATION OF STAYED JUDGMENT —GENERALLY.

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs by the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court. (Code 1852, §§ 3032, 3033; Code 1867, §§ 3500, 3501; Code 1876, §§ 3941, 3942; Code 1886, §§ 3661, 3662, Code 1896, § 478; Code 1907, § 2893; Code 1923, § 6153; Code 1940, T. 7, § 814; Acts 1951, No. 724, p. 1275).

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 40.

Applications for rehearing.

The application for rehearing may be made separately or may be included at the beginning of applicant's brief. All applications for rehearing, and the briefs supporting same, must be filed with the clerk of the court within 14 days (2 weeks) after the rendition of the judgment, except that in the case of a pre-trial appeal by the state in a criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within seven days (one week) after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief opposing the application is required, but a brief from the opposing party may be filed within 14 days (two weeks)—or, in the case of a pre-trial appeal by the state in a criminal case, within seven days (one week)—after the filing of the original application and brief. No second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court. (Amended 2-6-84, eff. 4-1-84.)

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No. 85-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TREADWELL FORD, INC.,

Appellant,

v.

CLARENCE W. CAMPBELL, *et al.*,

Appellees.

On Appeal From The Supreme Court Of Alabama

REPLY MEMORANDUM

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REPLY MEMORANDUM

In their Motion to Dismiss ("Motion"), appellees—in apparent recognition of the actual practice of the Supreme Court of Alabama of resolving questions raised for the first time on rehearing—attempt to divert attention from the actual practice of the court below by arguing that "[t]he Alabama *appellate courts* are firmly committed to the rule that new questions may not be presented to them for the first time on rehearing." Motion, at 3 (emphasis added). Whatever may be the practice of the intermediate appellate court of Alabama in this regard, that court never heard or had jurisdiction over this case.[1] It is the practice of the Supreme Court of Alabama which is

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[1] Cases decided by the Alabama Court of Civil Appeals are irrelevant for an additional reason which illustrates the unbridled freedom that the Supreme Court of Alabama possesses to resolve questions raised for the first time on rehearing. If a case is within the jurisdiction of the Court of Civil Appeals, then under the Alabama Rules of Appellate Procedure, no question decided against a litigant may be taken on certiorari to the Supreme Court of Alabama unless that question has been presented to the Court of Appeals in an application for rehearing. Ala. R. App. P. 39(a).

In sharp contrast, no rule or statute of Alabama even addresses the issue of what questions can be considered by the Supreme Court of Alabama in cases coming from the circuit (trial) courts or in applications for rehearing filed after the Supreme Court of Alabama hands down a decision. Thus, the court below is similarly situated with the Supreme Court of Mississippi in this regard, *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 n.13 (1982). As appellant has demonstrated in its Jurisdictional Statement and herein, the Supreme Court of Alabama, even more clearly than the Supreme Court of Mississippi, uses that freedom routinely to reach and decide questions raised for the first time on rehearing.

at issue in this case. Of the few cases relied on by appellees, only two—decided more than fifty and seventy-five years ago—arguably support this asserted "commitment" of the court below[2] with the kind of clarity required by this Court's decisions holding that a state practice must be "strictly or regularly" followed in order for that practice to provide a basis for denying this Court's jurisdiction over substantial federal questions. *E.g.*, *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964).

The overwhelming weight of relevant authority in the court below carries a burden which appellant does not even have to carry, because it establishes an affirmative practice by the court below of deciding questions raised for the first time on rehearing. Thus, application of the recent analysis of this Court in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), regarding the practice of the Supreme Court of Mississippi, is controlling here, establishing that this case is within this Court's appellate jurisdiction. Indeed, appellees, Motion, at 17 (emphasis added), virtually concede that *Hathorn* is controlling in the case at bar, stating that *Hathorn* "and like cases to the contrary notwithstanding . . . this Court *should* refrain" from taking jurisdiction over this case. Appellees fail to appreciate that if the federal questions presented here were properly presented to the Supreme Court of Alabama, and if they are substantial—a point which appellees expressly concede, Motion, at 18, this Court has obligatory jurisdiction over this case.

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[2] *Cooper* v. *State*, 226 Ala. 288, 147 So. 432 (1933); *State ex rel. Sigsbee* v. *City of Birmingham*, 160 Ala. 196, 48 So. 843 (1908).

I

Presentation of the Federal Constitutional Challenge to 12-22-72, *Code of Alabama* (1975)

Appellees, Motion, at 6-7, attempt in various ways to distinguish the seventeen cases in which the court below has entertained statutory and constitutional issues regarding § 12-22-72. Appellees' primary submission appears to be that in those seventeen other cases, "the parties were arguably uncertain as to whether the affirmed judgments fell within the specified language of § 12-22-72." Under appellees' argument, appellant-defendants such as appellant here are not "uncertain" whether the appeal penalty will be imposed in their cases as a matter of statutory construction; thus, appellant must, under some unwritten, unarticulated rule of the court below, raise its questions regarding § 12-22-72 on direct appeal.

Appellees' argument is seriously flawed in at least two respects. First, appellees do not draw this Court's attention to so much as a single line of one of those seventeen cases in which the court below suggests that it would itself draw such a distinction between the case at bar and those other seventeen cases. Thus, appellees' argument must fail because a state rule of presentation never before articulated by the highest court of a state can hardly comprise a state practice "strictly or regularly" followed so as to deprive this court of jurisdiction. *See NAACP* v. *Alabama*, 357 U.S. 449, 457 (1958).[3]

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[3] In *NAACP* v. *Alabama*, the State argued that the federal constitutional questions on which the NAACP sought review were required to be raised in a petition for writ of mandamus rather than by way of a petition for writ of certiorari as the

Appellees' argument is also refuted by *Central of Georgia Railway Co.* v. *Steed*, 287 Ala. 64, 248 So.2d 110 (1971). In *Steed*, a money judgment against the appellant was affirmed by the court below and the ten percent penalty was imposed. In an application for rehearing, the appellant in *Steed* did not contest the applicability of § 12-22-72 as a matter of statutory construction but, instead, challenged its imposition on other federal and state law grounds. Under appellees' argument to this Court, the appellant in *Steed* could not have raised any of these questions because none of them involved the interpretation of § 12-22-72. Thus, the case in the court below clearly on point[4] is

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NAACP had done. The Supreme Court of Alabama agreed with the State, but this Court refused to be bound by that holding, observing that the Alabama rule appeared to permit, but did not require, the NAACP to raise its constitutional questions in a mandamus action. 357 U.S., at 457.

The situation in this case is very similar to that in *NAACP* v. *Alabama*. Appellees correctly observe, Motion, at 7 & n.8, that appellant could have presented its federal constitutional challenge to § 12-22-72 on direct appeal; however, appellees, like the State of Alabama in the *NAACP* case, cannot point to a single case in the court below holding—or even suggesting—that presentation of such a challenge on direct appeal is the *exclusive* means by which a litigant can raise a federal constitutional challenge to § 12-22-72.

[4] Appellees, Motion, at 9, also attempt to distinguish *Central of Georgia Railway Co.* v. *Steed* by asserting that the *Steed* court "did not there address the federal constitutional issue raised on rehearing . . . ." This assertion is not supported by any language in the *Steed* court's opinion on rehearing. More importantly, the court below clearly reached the merits of at least one of the *Steed* appellant's federal constitutional questions raised for the first time on rehearing, namely, whether the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, preempted

flatly contrary to the argument which the appellees advance in this Court.[5]

II

Presentation of the Federal Constitutional Challenge to the Punitive Damage Awards

Appellees do not seriously join issue on the question of the practice of the court below as regards its power and disposition to consider issues raised for the first time on rehearing. Indeed, appellees cite, Motion, at 4, to only two cases in the court below to support their otherwise unsupported assertion that the court below "strictly or regularly" refuses to entertain new issues on rehearing. *Cooper* v. *State*, 226 Ala. 288, 147 So. 432 (1933); *State ex rel. Sigsbee* v. *City of Birmingham*, 160 Ala. 196, 48 So. 843 (1909). At the same time, appellees, Motion, at 10-14, concede that many cases cited by appellant are to the contrary.

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§ 12-22-72. Thus, *Steed* refutes appellees' argument that only questions involving the interpretation of § 12-22-72 can be raised on rehearing whether or not the court below decided the *Steed* appellant's Equal Protection Clause challenge to § 12-22-72.

[5] Appellees, Motion, at 5-6, incorrectly assert that *Lawrence* v. *Jones*, 37 Ala. 388 (1861), is inapposite. In *Lawrence*, the Supreme Court of Alabama imposed the ten percent penalty on the appellant. On certification of that judgment to the trial court, the appellee argued, contrary to existing Alabama precedent, that the penalty should be calculated based on the face amount of the judgment plus interest accrued on that judgment. The trial court and, on appeal, the Supreme Court of Alabama, ruled against the appellee on this issue of statutory construction. Thus, *Lawrence* is clear authority for the broader proposition that questions regarding the ten percent penalty statute do not necessarily even have to be raised in an application for rehearing but may be raised subsequently in the trial court.

In *Cooper v. State*, the applicant on rehearing had unsuccessfully challenged on direct appeal the constitutionality—under the Alabama constitution—of an Alabama statute. On rehearing, the applicant invoked a different provision of the Alabama constitution in challenging that statute; because the applicant's original state constitutional challenge to the statute had not been phrased in terms of a "general allegation of . . . unconstitutionality," the court below refused to consider it. *Id.*, at 293, 147 So., at 436.

Whatever *Cooper* stands for, it did not purport to overrule *Gibbons v. Gibbons*, 205 Ala. 636, 88 So. 833 (1921), in which the court below, in appellees' own words, Motion, at 13, "rejected the new theory" advanced on rehearing in support of the position the applicant had unsuccessfully asserted on direct appeal. Thus, at best, appellees have established that sometimes the court below will not consider a "new theory" on rehearing, whereas on other occasions, such as *Gibbons*, it will do so.

The only other case of the court below relied on by appellees is *State ex rel. Sigsbee* v. *City of Birmingham*, 160 Ala. 196, 48 So. 843 (1908). In that case, like *Cooper*, a constitutional issue had been raised and resolved against the applicant, who had been the appellant on direct appeal; on rehearing, which was decided February 5, 1909, the court below refused to consider additional constitutional questions raised by the applicant. Also illustrative of the practice of the court below, however, is that on April 16, 1909, the court below reached the merits and decided against the applicant on rehearing the question whether a specific Alabama statute not previously relied on by the applicant repealed, by implication, a

prior enacted Alabama statute. *State ex rel. Tubbs* v. *White*, 160 Ala. 168, 174, 49 So. 78, 81 (1909).

Appellees also appear to place some reliance on the cases in the court below in which the court, after enunciating a rule under which it would refrain from addressing questions raised for the first time on rehearing, nevertheless decides the "new" questions raised. This practice, which dates from at least 1893, *Robinson* v. *Allen*, 97 Ala. 596, 603, 12 So. 382, 604 (1893), must be assessed in the context of the view of the Supreme Court of Alabama that it is without power to issue advisory opinions. *See Opinion of the Justices No. 304*, 436 So.2d 832, 833 (Ala. 1983). Since the discussions of the merits of the newly raised questions in these cases cannot be regarded as advisory opinions, these cases lend additional support to appellant's position that the court below can and will hear newly raised issues on the merits on rehearing.

In *Kirkland* v. *Kirkland*, 281 Ala. 42, 198 So.2d 771 (1967), a case twice cited and relied on by appellees, Motion, at 3, 10, the applicant on rehearing, Dorsey Kirkland, raised for the first time the question whether he had a right "to enjoin [his brother, Robert Kirkland,] from placing [a] gate across that part of the boundary way which lies wholly on Dorsey's own land." 281 Ala., at 49, 198 So.2d, at 777. The court below, after stating that it would not "sanction" the practice of raising questions for the first time on rehearing, stated that its prior opinion had said nothing about Robert Kirkland's right to maintain the gate[6] and went on to state:

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[6] Appellees, Motion, at 10, misread *Kirkland* by stating that the court below "emphasized that its holding was *not* to be

> We will observe that, so far as we are advised, if Robert continues to obstruct Dorsey's use of his own land, Dorsey would be entitled to enjoin such obstruction.

It is difficult to conceive of language in which a question presented on rehearing could have been more clearly answered.

Finally, appellees, Motion, at 15, contend that the brief filed by appellant in support of its Application for Rehearing was "woefully inadequate," a conclusion apparently based on the appellees' demonstrably erroneous assertion, Motion, at 15-16, that the appellant's brief on rehearing "did not favor the Alabama Supreme Court with the citation of a single authority for the proposition that the awards in this case were unconstitutionally excessive." In its brief on rehearing, J.S. App., at 26a, appellant cited and relied on the Excessive Fines Clause and this Court's decision in *Trop* v. *Dulles*, 356 U.S. 86, 96 (1958), in support of its federal constitutional challenge to these punitive damage awards. Furthermore, appellees cannot even point to a rule of the court below suggesting

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understood as having decided the new question." Appellees' statement is apparently based on the following sentence in the opinion on rehearing: "Since the question was not considered, our decision is not to be understood as holding that [Kirkland] has the right to maintain the gate . . . ." However, this sentence in the court's opinion merely emphasized that it had not considered *in its original opinion* Robert Kirkland's right to maintain the gateway. The words "our decision" in the quoted sentence clearly refer to the opinion of the court on direct appeal, not to the court's decision on rehearing. The court proceeded, on rehearing, to decide the "new" question advanced by Dorsey Kirkland.

any possible merit to this argument, because the only rule applicable to applications for rehearing in that court and to briefs filed in support of applications for rehearing is Ala. R. App. P. 40, reproduced in the appendix hereto, which imposes no requirement even remotely analogous to the "woefully inadequate" standard invented by appellees in this Court. In addition, only one of the cases in the court below cited by appellees, Motion, at 16, in apparent support of this argument involved the failure of a party adequately to brief assignments of error in it brief on direct appeal. In that case, *Morgan* v. *Cherokee County Board of Education*, 257 Ala. 201, 204, 58 So.2d 134, 136 (1952), the appellant had, in its brief, "merely copie[d] the assignments of error without argument or citation of authority."[7]

It is not surprising that appellees found two cases in the court below which support its position that the Supreme Court of Alabama has occasionally declined to entertain questions raised for the first time on rehearing. Appellant, at the very least, has demonstrated that this alleged practice of the court below

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[7] This court considered and rejected a similar argument in *NAACP* v. *Alabama*, 377 U.S. 288, 294-99 (1964), after thoroughly reviewing the practice of the court below with respect to enforcement of its alleged rule regarding the adequacy of briefs filed on direct appeal. It is noteworthy that even that case was decided before Alabama abandoned its more technical rules of appellate practice and implemented the currently effective Rules of Appellate Procedure (adopted June 17, 1975). For example, in 1975 Alabama completely abandoned the concept of "assignments of error" on appeal, Ala. R. App. P. 20, and under Ala. R. App. P. 1, those rules "shall be construed so as to assure the just . . . determination of every appellate proceeding on its merits."

has not been "strictly or regularly" followed. Indeed, the two cases cited by appellees, read in light of the three dozen cases cited by appellant, show only that if there is any practice of the Supreme Court of Alabama which approaches the "strict or regular" standard, it is a practice which *does* permit new questions to be considered on rehearing. The actual practice of the court below is clear and cannot serve as an independent and adequate state ground to sustain the decision below.[8]

June 11, 1986

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[8] Appellees suggest, Motion, at 11, that some of the cases relied on by appellant may not be relevant because the questions raised for the first time and decided on rehearing are not federal constitutional questions. No case in the court below, however, is suggestive of such a distinction, and it is extremely doubtful that this Court would permit its jurisdiction to be preempted by the application of a state procedural rule which discriminated against the assertion of substantial federal rights in the fashion suggested by appellees.